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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

ROBERT B. BLALACK,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

No. 232

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Sixth Circuit

and

SUPPORTING BRIEF.

WALTER P. ARMSTRONG,
R. G. DRAPER,
D. L. GERWIN,
L. E. GWINN,
Counsel for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

In July, 1945, two informations, numbered 6692 and 6710, respectively, were filed in the United States District Court at Memphis, Tennessee, against petitioner, the operator of two meat markets in that City, charging violations of Regulation 1 of the Office of Economic Stabilization (R. 1-7).

Petitioner was found guilty on Count II of Information No. 6692, which alleged that he "did unlawfully, knowingly and wilfully break a veal carcass" (R. 3). He was also convicted under Information No. 6710, which alleged that he "did unlawfully, knowingly and wilfully store or retain in his possession or possess several hundred pounds of veal which had not been graded or grade marked in the manner required by the Office of Economic Stabilization Regulation 1 and any and all amendments thereto."

Petitioner was sentenced to a prison term of eight months on each of the counts, the sentences to run concurrently, and was fined $500.00 under the first information and $1,000.00 under the second information (R. 14-17).

The Circuit Court of Appeals affirmed the judgments of conviction, holding, among other things, that the Taft Amendment, relied on by petitioner, was not applicable to regulations issued by the Economic Stabilization Director.

STATUTE AND REGULATIONS INVOLVED.

OES Regulation 1, and material amendment thereto, are set out in the appendix.

The Regulation recites that it is issued "pursuant to the provisions of the Act of October 2, 1942, entitled 'An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes' (Public Law No. 729, 77th Congress, 2nd Session), Executive Order No. 9250, dated October 3, 1942, and Executive Order No. 9328, dated April 8, 1943."

Section 4002.1 of the Regulation, so far as material, reads:

> "No person shall * * * store or retain in his possession * * * any beef, veal, lamb or mutton unless such beef, veal, lamb or mutton has been graded and grade marked in the manner required by this regulation * * *."

Section 4002.2 thereof provides:

> "No person shall * * * break * * * any * * * veal carcass or wholesale cut unless such carcass or wholesale cut has been identified by grade in accordance with this section * * *."

Section 4002.2(a) (2) is as follows:

> "Veal carcasses and the wholesale cuts therein contained shall be graded into the following uniform grades: Choice, good, commercial, utility and cull. In determining the grade of each such carcass the 'Specifications for Official United States Standards for Grades of Veal and Calf Carcasses' set forth in # 1364.529 of Revised Maximum Price Regulation No. 169, and incorporated herein by reference, shall be used and the grade of such carcass shall apply to each wholesale cut derived therefrom, except that the specifications therein for the two grades, prime and choice, shall be combined and treated as a single grade, choice."

The Emergency Price Control Act (C. 26, 56 Stat. 23, Title 50 U. S. C. War Appendix, Sec. 961, et seq.) became law January 30, 1942. It was amended by the Economic Stabilization Act of October 2, 1942 (C. 578, 50 Stat. 765, Title 50 U. S. C. War Appendix, Sec. 961, et seq.).

The Taft Amendment was enacted on July 16, 1943, as a specific amendment to Section 2 of the Emergency Price Control Act, as amended, by adding at the end thereof a new sub-section (j) which, among other things, provides:

> "Nothing in this Act shall be construed * * * (2) as authorizing the Administrator to require the grade labeling of any commodity."

The Stabilization Extension Act of 1944, passed June 30, 1944, re-enacted, in identical language, the Taft Amendment as it amended Section 2 of the Emergency Price Con-

trol Act of 1942, "as amended" (Public Law 838, 78th Congress, 2nd Session, 58th Stat. 639).

Prior to the adoption of the Taft Amendment, the Price Administrator had required that beef and veal carcasses be graded and grade marked, this requirement being imposed by Revised Maximum Price Regulation No. 169, issued by the Price Administrator on December 10, 1942 (8 F. R. 164, 491, 4097, as amended).

OES Regulation 1, issued August 5, 1943, this being twenty days subsequent to the adoption of the Taft Amendment, incorporated by reference the grade requirements of Revised Maximum Price Regulation No. 169.

On September 16, 1943, the Economic Stabilization Director issued Directive No. 184 (8 F. R. 12669), the pertinent provisions of which are as follows:

> "The Price Administrator of the Office of Price Administration is authorized and directed to enforce the provisions of Office of Economic Stabilization Regulation No. 1, issued August 5, 1943, providing for the grading and grade labeling of meats.
>
> "The power to enforce such Regulation No. 1 shall include, but shall not be limited to, the power to make such surveys and investigations, to issue such interpretations, and to bring such actions and proceedings as the Price Administrator may deem to be necessary or desirable to effectuate the purposes thereof. The power to enforce such Regulation No. 1 shall not, however, include the power to change, amend, revoke or rescind its provisions. Nor shall such power include any authority to issue regulations requiring grade labeling of any commodity."

The Taft Amendment had its origin in the belief of Congress that the Price Administrator "in issuing certain regulations already promulgated" had "exceeded the limitations expressed in Section 2 (h)" of the Act,[1] and

1 See statement of the managers on the part of the House of Representatives in the Conference Report accompanying H. J. Res. 147 on July 8, 1943 (H. Rep. No. 697, 78 Cong., 1st Sess.).

the effect of the Amendment was to invalidate such regulations. Thomas Paper Stock Co. et al. v. Porter, Price Administrator, 66 S. Ct. 884 (Advance Sheets), decided by this Court April 22, 1946.

Among regulations thus invalidated were those sections of Revised Maximum Price Regulation No. 169, theretofore promulgated by the Price Administrator but thereafter incorporated in OES Regulation 1, issued by the Economic Stabilization Director.

Apprehending that the amendment would be given the construction it later received in Thomas Paper Stock Co. v. Porter, supra, the Office of Economic Stabilization issued OES Regulation 1 to continue in effect the system initially set up by the Office of Price Administration regulation.[2]

No statutes, or executive orders, material to OES regulation 1, were passed or issued between its promulgation and the date of the Taft Amendment, and the Regulation recites that it was issued under the authority of statutes and executive orders in existence when the regulation was promulgated.

As conceived by petitioner, the Taft Amendment, passed to meet the objection that the Price Administration, in the issuance of regulations, had exceeded limitations imposed by the Emergency Price Control Act, was not directed against such regulations when issued by the Price Administrator only but was intended to follow the regulatory powers conferred by the Emergency Price Control Act, as amended by the Economic Stabilization Act, and the Amendment ought reasonably to be read as meaning the Price Administrator or any other department or agency of the Government which might be clothed with power to issue regulations within the framework of the legislative standards established by the Emergency Price

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2 Interim Report of Special Subcommittee on Investigation of Restrictions of Brand Names, 78th Cong., 1st Sess., H. Rep. No. 808, Sec. 1, p. 36.

Control Act, as amended by the Economic Stabilization Act.

As construed by petitioner, Congress, in the Emergency Price Control Act, as amended by the Economic Stabilization Act, affirmatively indicated the wide area subject to price control and stabilization and by specific exceptions and limitations, including the Taft Amendment, excluded certain areas to which the authority of administrative agencies could not extend.

It could hardly have been the intention of Congress that the boundaries thus defined could be changed at will through one administrative agency, whose powers were not specifically defined, issuing a regulation which exceeded the limitations imposed upon another administrative agency by express provisions of the Act when both regulations related to the same subject matter and would have precisely the same effect in the administration of the scheme of price control and stabilization established by the statute.

In determining whether the Taft Amendment was intended to preclude the promulgation of any regulation requiring the grade labeling of commodities, it is immaterial whether the Economic Stabilization Act be treated as an amendment to the Emergency Price Control Act or as complementary legislation.

If, as petitioner insists, the Taft Amendment is applicable to any regulation requiring the grade labeling of commodities, issued in the execution of the Emergency Price Control Act, as amended by the Economic Stabilization Act, then OES Regulation 1 is void on its face and the acts charged against petitioner are not within the scope of any statute of the United States.

The Circuit Court of Appeals rejected the theory and contention of petitioner. The grounds on which such rejection was predicated are shown by the following quotation from the opinion:

"The Emergency Price Control Act was 'amended' generally on October 2, 1942, by the Stabilization Act (56 Stat. 765), under the authority of which the Regulation herein involved was issued. Although it is said to 'amend' the Price Control Act, the provisions of the Stabilization Act are so diverse, there is no possibility of meshing the two in a manner suggested by appellant's contention.

* * * * * * *

"* * * the Taft Amendment in its subsections 2, 3 and 4, which deal with labeling and standardization, imposes limitations on the 'Administrator' only, and cannot be construed to apply to other officers of the Government. So far as the limitations of the Taft Amendment are concerned, the Stabilization Director was free to issue the challenged regulation."

In the belief that the term "Administrator", as used in the Taft Amendment, should be broadly construed to carry out the intent of Congress and not so narrowly as to nullify the Amendment, and that its construction and application involve a question of general importance, petitioner has brought the decision of the Circuit Court of Appeals on the point under consideration to the attention of this Court as one of the grounds on which he seeks the writ of certiorari in this cause.

THE FACTS.

Two meat markets operated by petitioner, located in the same building, were inspected on Saturday afternoon, June 9, 1945, by a meat inspector for the United States Department of Agriculture, stationed at Memphis, Tennessee (R. 49) and a food director of the Memphis Health Department (R. 74) and found to be in "good shape" (R. 55). The meats in these markets, including a calf in one of the refrigerators or coolers therein, had been graded and marked as required by applicable regulations (R. 51, 52, 63, 64, 65, 70).

After completing this inspection, the inspectors went to another building and in a storage room and cooler therein, rented by petitioner, found three veal carcasses, or the remains thereof, that had not been graded or grade marked (R. 53, 67). They also found some steaks and roasts on the table in the storage room. Two of these were wrapped in packages and the word "May" was written on one of the packages (R. 53, 67). The handwriting on the wrapper was not identified. When it was offered in evidence, counsel for petitioner offered to submit petitioner's handwriting for examination and comparison but the offer was declined (R. 56).

In the absence of direct evidence, showing the source of this meat and the identity of the person or persons responsible for its storage and handling in the cooler, rented by petitioner, the Government relied upon the finding of the ungraded meat and the actions of petitioner, contemporaneous with the examination of the cooler, and later, to supply the necessary inference of guilty knowledge on his part.

Physical facts and circumstances, relevant in the consideration of that question, will be briefly stated:

The property of the City Markets, Inc., Memphis, an area of approximately two and one-half "square blocks", was bounded on the north, south, east and west by City streets. Two large buildings, extending from Larkin Street on the north to Poplar Avenue on the south, each about the same size and separated by a driveway, were located on this property, usually referred to as the "Curb Market" (R. 37, 38).

Stalls (R. 77) or spaces in the buildings were rented to farmers and merchants for the sale of their products, including meat. A few farmers and a "lot of merchants" occupied the front building, this facing Cleveland Street

on the west. The back building, facing Market Street on the east, was rented largely but not exclusively by farmers (R. 38).

Petitioner operated two meat markets in the front building. These were complete in every respect, the equipment including refrigeration plants (R. 44). The larger of these, located near the north end of this building, was at least 250 feet from the cooler in the back building (R. 42, 45, 47, 61, 63). His other market, located at the south end of the front building, a distance of approximately 175 feet separating the two markets, was about 75 feet from the cooler in the other building, this cooler being located in the southern part of that building and at the back end of a frozen food locker plant, owned and operated by one of the Government witnesses (R. 73, 77).

This cooler was originally installed for a partnership, composed of petitioner and J. T. Ledbetter, a Government witness, which conducted a meat market in the front building from 1941 to January 29, 1945, when petitioner purchased the interest of Ledbetter. Petitioner continued to operate the business and pay rent on the cooler (R. 39, 44). Prior to dissolution of the partnership, meats were processed in this cooler and taken to the market (R. 47).

There was a lock on the outside door of the storage room but none on the cooler (R. 67, 68). This room could be entered through a window and the door opened without being unlocked from the outside (R. 69). This was done on Monday morning, following the inspection on Saturday afternoon (R. 69).

There is no evidence that petitioner ever carried or personally used the key. It was not kept in the north market, where he worked and had his office (R. 44), but "hung on a post in the lower" or south market (R. 46, 67). When the storage room was in use the employee operating that room usually, but not always, brought the

key therefrom and hung it on a post in the south market. Frequently an employee would take the key home with him at night (R. 46). No particular employee was custodian of the key. All of them, averaging from twelve to sixteen in number, had access to it (R. 46). Occasionally outsiders would be permitted to store meat in the cooler at night (R. 48).

There is no direct evidence that petitioner or any of his employees had used this cooler for any purpose, or had been in the building in which it was located, for a period of several weeks prior to the inspection that resulted in this prosecution.

Immediately preceding this inspection, and in response to an inquiry about the cooler, petitioner stated to the inspectors that he was not then using it, that he only used it for hog carcasses, that it had been "laying idle" for some time, because he could not get hogs to make sausage or anything to put in the cooler (R. 52, 66, 72).

Following this conversation, the inspectors went to the other building to examine the cooler. They found the storage room locked. One of them returned to the north market, where petitioner was, and stated that he would like to get the key (R. 66). Petitioner, after instructing Thomas, one of his employees, to get the key and bring it up there to the inspector, "turned around and walked on around through the market". The inspector "walked on off", without observing where petitioner went and without waiting for the key (R. 66, 67). Thomas brought the key and unlocked the door to the storage room (R. 67).

Petitioner, when asked for the key, was not requested to accompany the inspectors nor to await their return (R. 66). He was absent from the market when they sent for him at some stage of their examination of the cooler and had not returned when they completed that examination and sealed the cooler (R. 57, 68). Petitioner spent

a substantial portion, if not the larger part, of his time away from the market, this being necessary in the conduct of the business (R. 47, 71).

After sealing the cooler, the inspectors informed Thomas that he would be held responsible if the seals were broken when they returned (R. 57, 68), and they instructed him to tell petitioner to be there at "9 o'clock Monday morning" (R. 57, 62). There is no direct evidence of the delivery of this message.

When the inspectors returned Monday morning, the seals were intact, but petitioner was not present. After waiting for him until around 10:30, the inspectors gained admission to the storage room, someone crawling through a window and opening the door from the inside. It had been locked by one of the inspectors personally on Saturday afternoon (R. 57), but whether he kept the key or delivered it to an employee of petitioner is not shown.

About a week later, the Federal inspector, still investigating in an effort to determine the source of the meat, again visited the market of petitioner and discussed this matter with him. In that conversation, no mention being made of petitioner's leaving his market on Saturday nor of the message Thomas was instructed to deliver, he was asked if he went to the market on Monday and where he was that day. In reply, petitioner stated that he was trying to locate, if possible, the person responsible for putting the meat in the cooler; that he knew nothing about its being there and had nothing to do with it (R. 59, 61, 63).

It is the theory of petitioner that the foregoing circumstances do not constitute substantial evidence that excludes every rational hypothesis except guilt, and that it was, therefore, error for the Circuit Court of Appeals to fail to apply corrective processes to the action of the trial judge in overruling petitioner's motion for a directed verdict (R. 81, 83).

INSTRUCTIONS OF THE COURT.

The trial court gave the usual instructions on reasonable doubt and the rule governing the consideration of circumstantial evidence (R. 89, 90) but refused special requests in which he was asked to instruct the jury:

(a) That it could not speculate as to which of two or more persons might be responsible for the alleged violation of law set forth in the information, this being predicated on evidence that persons other than petitioner had equal opportunity to have committed the alleged offense (R. 94).

(b) That the inference to be drawn from the finding of unstamped meat on property rented to the defendant was insufficient to overcome the presumption of innocence unless aided by other facts and circumstances tending to establish guilt (R. 94).

STATEMENT AS TO BASIS OF JURISDICTION.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended.

A copy of the opinion of the United States Circuit Court of Appeals for the Sixth Circuit is in the record presented to this Court (R. pp. 111-123; 154 F. 2d 591).

The time for filing this petition was extended to and including June 27, 1946, by order of Mr. Justice Reed, entered June 3, 1946.

QUESTIONS PRESENTED.

1. Whether or not the acts charged in, and attempted to be proven under, the counts in the informations on which convictions were had, charging respectively that petitioner did "wilfully break" a veal carcass (R. 3) and did "wilfully store, or retain in his possession several hundred

pounds of veal which had not been graded or grade marked in the manner required by the Office of Economic Stabilization" (R. 7), constituted an offense against the laws of the United States. Or, put more specifically, whether or not the limitations of the Taft Amendment extended to a regulation thereafter promulgated by the Economic Stabilization Director, requiring the grade labeling of commodities and delegating to the Price Administrator the duty of enforcing that regulation.

2. Whether or not the rule, that in order to justify a conviction on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt, is a mere admonition to the jury or a rule that should be applied by the trial and the appellate court in considering the sufficiency of the evidence to support a verdict.

3. Whether or not the circumstances heretofore recited were sufficient to justify the submission of the case to the jury.

4. Whether or not the trial court erred in refusing to charge the jury as set out in petitioner's special requests Nos. 8 and 14, respectively, that it could not speculate as to which of two or more persons might have been responsible for the commission of the alleged offense, but should acquit petitioner unless it found that he was the particular person responsible for the alleged criminal acts, and that the mere finding of unstamped meat on property previously rented by petitioner, together with his failure to testify, were not in themselves sufficient to justify a verdict of guilty.

REASONS WHY THE WRIT SHOULD BE GRANTED.

The opinion of the Circuit Court of Appeals for the Sixth Circuit in this case is reported in 154 F. 2d 591 (Advance Sheet May 27, 1946).

Reasons why review thereof is sought by petitioner include:

1. In holding that the Taft Amendment did not apply to a regulation requiring the grade-labelling of commodities, issued by the Economic Stabilization Director, but was a limitation upon the Price Administrator only, the Circuit Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court.

In reaching its conclusion that the term "Administrator" as used in the Taft Amendment should be so literally construed as to restrict the prohibitions of that Amendment to the Price Administrator only, the Circuit Court of Appeals disregarded the unity of the legislative plan for price control and stabilization established by the Emergency Price Control Act, as amended by the Economic Stabilization Act. The caption of the latter Act recites that it is an amendment to the Price Control Act, but it is immaterial whether these acts be construed as a single statute, this being the rule ordinarily applied to an original and an amendatory act (Texas v. East Texas R. Co., 258 U. S. 204, 217), or construed *in pari materia* as complementary legislation (U. S. v. Freeman, 3 Howard 557, 11 L. Ed. 724). Obviously these acts were not intended to establish separate schemes for the control and stabilization of prices nor to set up different standards to govern administrative regulations that might be promulgated in the execution of that scheme or plan.

The Taft Amendment had its origin in the belief of Congress that administrative agencies in the promulgation

of regulations had exceeded the limitations of Section 2 (h) of the Emergency Price Control Act (Thomas Paper Stock Co. et al. v. Porter, Price Administrator, 66 S. Ct. 884 [Advance Sheet], decided by this Court April 22, 1946).

The Taft Amendment clearly invalidated the regulation, theretofore issued by the Price Administrator, requiring the grade labeling of commodities. To rescue the regulation thus struck down by the Taft Amendment, and permit the continued enforcement thereof by the Administrator without change, OES Regulation 1 was promulgated.[3] According to the Congressional view, a regulation requiring the grade labeling of commodities exceeded the limitations of Section 2 (h) of the Price Control Act (Thomas Paper Stock Co. v. Porter, supra).

The limitations of Section 2 (h), strengthened but not weakened by other limitations in the Economic Stabilization Act, and the Taft Amendment without change were incorporated in the Stabilization Extension Act of 1944. It is therefore clear of doubt that Congress intended this Amendment to follow the regulatory power and not merely to restrict the powers of the Administrator only. At any rate, the decision of the Circuit Court of Appeals involves not only the validity of OES Regulation 1 but also an important principle of statutory construction.

If the Taft Amendment, as petitioner believes, was intended to exclude grade labeling from the area to which regulations could extend, then OES Regulation 1 was invalid on its face, petitioner was convicted for acts not within the scope of the statute, and his conviction is therefore void (U. S. v. Clark Brewer, 139 U. S. 278; In re Bonner, 151 U. S. 242; Fasulo v. U. S., 272 U. S. 620; Pierce v. U. S., 314 U. S. 306).

2. In holding that the proven circumstances justified the submission of the case to the jury, the Court of Ap-

[3] Interim Report of Special Subcommittee on Investigation of Restrictions on Brand Names, 78th Cong., 1st Sess., H. Rep. No. 808, Sec. 1, p. 36.

peals did not apply the rule, sustained by the great weight of authority, that a conviction should be reversed unless the circumstances exclude every rational hypothesis except guilt (Leslie v. U. S., 10th Cir., 43 F. 2d 288-289; Neal v. U. S., 8th Cir., 102 F. 2d 643, 648; Kassin v. U. S., 5th Cir., 87 F. 2d 183, 184, 185; U. S. v. Russo, 3rd Cir., 123 F. 2d 420, 422), but predicated its conclusion upon a balancing of probabilities with respect to the guilt or innocence of the accused.

In this there was error. "Quantitative probability is only the greater chance. It is not proof, nor even probative evidence of the proposition to be proved" (Day v. Boston etc. R. R., 96 Me. 207, 52 Atl. 777, quoted with approval in Virginia etc. Ry. Co. v. Hawk, 6th Circuit, 160 Fed. 348-352. Recent decisions of the Circuit Court of Appeals are in conflict with the rule as stated and applied in the authorities cited. These decisions hold that the rule that the circumstances must exclude every rational hypothesis but guilt, has no application on appeal and that the jury may choose between an inference of guilt and an inference of innocence, if either may reasonably be drawn from the proven circumstances in the case (U. S. v. Picarelli, 2nd Circuit, 148 F. 2d 997, 998; U. S. v. Feinberg, 2nd Circuit, 140 F. 2d 592, 594; U. S. v. Valenti, 134 F. 2d 362, 364; U. S. v. Becker, 2nd Circuit, 62 F. 2d 1007, 1010).

As conceived by petitioner, the probative sufficiency of circumstances, not merely the weight they should be given, which is a question for the jury, is involved where the circumstances are as consistent with innocence as with guilt. Or, otherwise expressed, circumstances that may be reconciled with a reasonable theory of innocence do not constitute substantial evidence of guilt, and this is a question of law for the court.

Directly in point is the well-considered case of Isbell v. U. S., 8th Circuit, 227 Fed. 788, 790, 793, from which we quote as follows:

"If there is, at the conclusion of a trial, no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, for facts consistent with his innocence are never evidence of his guilt. Nor does the duty of the court to consider and determine whether or not there is substantial evidence of facts which exclude every other hypothesis but that of guilt require the court, in our opinion, to pass upon the weight of the evidence, the credibility of the witnesses, or to direct an acquittal unless he believes the defendant guilty beyond a reasonable doubt."

This Court has defined "substantial evidence" (Edison Co. v. National Labor Relations Board, 305 U. S. 197, 229).[4] It is also held that the question of whether the evidence is sufficient in "kind or amount" to support a verdict is a question of law for the court (Abrams v. U. S., 250 U. S. 616; Atlantic Coast Line R. R. Co. v. Triggers, 279 U. S. 785), but so far as we have been able to discover, the precise point of conflict between the minority rule, followed in the Second Circuit, and the majority rule, has not been adjudicated by this Court. We think it clear that the Circuit Court of Appeals as a practical matter attempted to apply the rule followed by the Second Circuit in its consideration of the circumstances relied upon to support a conviction. Reasons for that conclusion are stated in the supporting brief.

Irrespective, however, of the rule that should be applied in the appellate court, the circumstances herein, whether considered singly or collectively, are so destitute of probative value that the conviction herein rests entirely upon suspicion and not upon substantial evidence of guilt.

In the brief, these circumstances are briefly considered in the light of the applicable law.

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[4] "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

3. The undisputed evidence established that persons other than Petitioner had equal access to the cooler, containing the ungraded meat, and equal opportunity to have stored it there. In Petitioner's Special Request No. 8, the Court was asked to instruct the jury that it should not "speculate which of two or more individuals" might be responsible for the acts charged in the informations. The request was refused (R. 94). The general charge gave the usual instructions on reasonable doubt and the rules to be applied in considering circumstantial evidence, but did not cover the point included in the special request. This was a part of Petitioner's theory of the case and supported by material evidence. Its refusal was plain error (Thorwegan v. King, 111 U. S., 549; McDonald v. U .S., 6th Circuit, 241 Fed. 793, 799; Memphis Street Rwy. Co. v. Newman, 108 Tenn., 666, 669, 69 S. W. 269; Gardner v. State, 196 Pac., 750, 27 Wyo., 316).

The refusal of the Petitioner's Special Request No. 14 (R. 94) was equally prejudicial. In the general charge, the jury was told that Petitioner could not be convicted unless the proof established knowledge on his part of the storing of ungraded meat in the cooler, but the jury was not instructed on the point of controlling importance, namely, whether such knowledge could be inferred from Petitioner's constructive possession alone. It is well settled that possession in order to support an inference of guilty knowledge, must be actual and exclusive, and that such knowledge may not be inferred from constructive possession alone (Fosse v. U. S., 9th Circuit, 44 F. 2d, 915, 918; U. S. v. Russo, 3rd Circuit, 123 F. 2d, 420, 422). There was no direct evidence that Petitioner was using the cooler at or near the time the meat was found there, nor that he or any of his employees had even been in the separate building where it was located, for a period of weeks preceding the inspection which resulted in the find-

ing of the meat. Obviously, a point of such vital importance as the inference that could be drawn from the finding of this meat in a cooler, away from the business establishments of Petitioner, should have been covered by a clear and explicit instruction. Bird v. United States, 180 U. S. 356; Little v. United States, 10th Cir., 73 F. 2d 861; United States v. Messinger, 4th Cir., 68 F. 2d 234; McDonald v. United States, 6th Cir., 241 Fed. 793, 799; Northern Central Coal Co. v. Hughes, 8th Cir., 224 Fed. 57.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Judicial Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and proceedings in the case entitled on its docket: Robert B. Blalack versus United States of America, No. 10,080, to the end that said case may be reviewed and determined by this Court, as provided by Section 240 of the Judicial Code (U. S. C. A. Title 18, Sec. 47) and the applicable rules promulgated by this Court governing applications for certiorari in criminal cases, and that the judgment of the Court of Appeals be reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

WALTER P. ARMSTRONG,
R. G. DRAPER,
D. L. GERWIN
L. E. GWINN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

OPINION OF LOWER COURTS.

No opinion was filed by the District Court. The opinion of the Court of Appeals (R. 112-123) is published in 154 F. 2d 591 (Advance Sheet, May 27, 1946).

II.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347), as amended, the Act of Congress of March 8, 1934, Rule 11 of the Rules of Practice and Procedure promulgated by this Court May 7, 1934, and Rule 37 (b) of the new Rules of Criminal Procedure, effective March 21, 1946.

The time for filing the petition for certiorari herein was extended to June 27, 1946, by order of Mr. Justice Stanley Reed, dated June 3, 1946, and this petition is filed before the expiration of such period of extension.

The transcript of record in this case, including the proceedings in the Circuit Court of Appeals, has been filed herein in accordance with Rule 38 of this Court.

III.

SPECIFICATIONS OF ERROR.

The errors herein complained of have been set out in substance under "Questions Presented," in the petition, and will, therefore, not be specifically set out here.

IV.

THE FACTS.

The facts have been recounted, and in sufficient detail, in the petition, and will not further be stated here, but specific matters, deemed relevant, will be discussed in the argument.

ARGUMENT.

Instead of giving a summary of the argument, reference is made to the statement in the petition of the reasons why the writ of certiorari should be granted, this statement briefly summarizing the matters included in the argument.

The issues of law and fact, presented by the petition, will be discussed under three headings, each indicating the scope of the argument on the point therein stated.

I.

In Holding That the Taft Amendment did not Apply to a Regulation Requiring the Grade Labeling of Commodities, Issued by the Economic Stabilization Director, but was a Limitation Upon the Price Administrator Only, the Circuit Court of Appeals Decided an Important Question of Federal Law Which has not Been, but Should be, Settled by This Court.

As conceived by us, the Circuit Court of Appeals, in holding that the Taft Amendment did not apply to OES Regulation 1, not only gave a literal interpretation to the term "Administrator", as it appears in that Amendment, thus defeating its purpose, but treated the Emergency Price Control Act and the Economic Stabilization Act as establishing separate and unrelated schemes for the control and stabilization of prices when it was the intent of Congress in passing these statutes, the Economic Stabilization Act being an amendment to the Emergency Price Control Act, to establish a single uniform scheme for such control and stabilization.

Being an amendment to the Emergency Price Control Act, the provisions of the Stabilization Act of October 2, 1942, as amended, must be construed together with those

of the original Act and as constituting a single statute. Texas v. East Texas R. Co., 258 U. S. 204, 217; 59 C. J., p. 1094.

The cardinal rule, of course, in the interpretation of the statutes is to ascertain the legislative intent. In ascertaining that purpose, the court may examine the title of the act, the source in previous legislation of the particular provision in question, and the legislative scheme or plan by which the general purpose of the act is to be carried out (U. S. v. Katz, 271 U. S. 354, 357). The intention of the lawmaker is to be deduced from a view of every material part of the statute (Helmick v. Hellman, 276 U. S. 233). In determining the meaning of a word, the context may be considered (U. S. v. Murdock, 290 U. S. 389) and words may be **expanded** or **restricted** when necessary to carry out the manifest intent of a legislature or congress (Silver v. Ladd, 74 U. S. 219; United States v. Laudani, 320 U. S. 543; United States v. Carbone, decided March 25, 1946, 90 L. Ed. [Advance Sheet No. 11] 679).

"Literalness" should not be carried to the point of strangling the meaning of a statute (Utah Junk Co. v. Porter, Price Administrator, decided April 22, 1946, and reported in 66 S. Ct., pp. 889-892).

In the application of the principle under consideration, it is immaterial whether the Stabilization Act be considered as an amendment to the Emergency Price Control Act or whether the two Acts be considered as in pari materia (United States v. Freeman, 3 Howard 557).

In the case last cited, this Court said:

> "These citations are but different illustrations of the rule that the meaning of the Legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the Legislature proceeded, from the end in view, or the purpose which was designed—the limitation of the rule being, that to

extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the lawmaker proceeded, and not only within a like reason."

Considering actualities, Congress accomplished nothing and could not reasonably have hoped to accomplish anything by the provision of the Taft Amendment under discussion if the term "administrator" was not intended to include any administrative agency which might issue regulations requiring the grade labeling of commodities.

The Taft Amendent is not independent legislation and, in determining the meaning of the term "administrator", as therein used, the context, the history and the purpose of the statute, including the Amendment, may be considered. When thus considered, it is clear that the term "administrator", as therein used, was intended to apply to any agency charged with the execution of the general plan of the Act for the control and stabilization of prices. If not also intended to preclude any requirement for the grade labeling of commodities in regulations to carry out the provisions of the Emergency Price Control Act, as amended by the Economic Stabilization Act, or in the execution of the scheme or plan by which the closely connected purposes of the two Acts were to be accomplished, why was the Taft Amendment re-enacted without change on June 30, 1944, in a statute which provided that it might be cited as the "Stabilization Extension Act of 1944"?

In their brief, filed in the Circuit Court of Appeals, attorneys for the Government argued that the failure of Congress to extend the restrictions of the Amendment specifically to the Economic Stabilization Director was equivalent to a legislative ratification of his exercise of the power requiring grade labeling. The major premise of this argument was a statement made by a Special Sub-

committee of the House on Investigation of Restrictions on Brand Names (78th Cong., 1st sess., H. Rep. No. 808, No. 1, p. 36).

The statement of the Subcommittee, heavily relied on by the Government, states that the system of grade labeling, "initially set up by the Office of Price Administration regulations" had the "support of the industry from the outset" and that OES Regulation 1 was "designed to allay widespread fears that following the Taft Amendment grading and labeling of meat would have to be discontinued."

This statement of the Special Subcommittee, if relevant at all, establishes the converse of the proposition asserted by the Government. If the meat industry and Congress, after the promulgation of OES Regulation 1, were satisfied with the administrative suspension or nullification of the provision of the Taft Amendent withholding the authority for the grade labeling of commodities, what purpose could have been served by again writing that provision into the Emergency Price Control Act, as amended by the Economic Stabilization Act?

If the system had the support of the meat "industry from the outset," and Congress was influenced by that attitude, the provision of the Taft Amendment here under discussion would not have been passed in the first instance.

If Congress, in passing the Economic Stabilization Act of 1944, had intended to ratify OES Regulation 1, nullifying a material provision of the Taft Amendment, it would have eliminated that provision from the Amendment. Not only did it leave the Amendment unchanged but also the limitations of Section 2 (h) of the Emergency Price Control Act, as amended by the Economic Stabilization Act.

According to the view of Congress, as interpreted by this Court in Thomas Paper Stock Co. v. Porter, supra, the Taft Amendment was directed specifically against regulations which exceeded these limitations. Necessarily,

the regulation theretofore promulgated by the Price Administrator, requiring the grade labeling of commodities, fell under the condemnation of the Amendment.

If the declared common purpose of the Price Control and the Stabilization Acts, "to stabilize prices" for the "effective prosecution of the war" (U. S. C. A., Title 50, Appendix, 901, 961), be kept in mind, and the Acts construed as a single statute or in pari materia, there will be no difficulty in reaching the conclusion that the Taft Amendment was intended to reach any administrative regulation that required the grade labeling of commodities. Restrictions of the Stabilization Act (U. S. C. A., Title 50, Appendix, 962) preclude any administrative agency from suspending the limitations of Section 2 (h) or the Taft Amendment.

To permit the Price Administrator to continue to enforce a regulation, struck down by the Taft Amendment, OES Regulation 1, incorporating therein the invalidated regulation, was promulgated. Obviously, the regulation was intended to nullify by circumvention a material provision of the Taft Amendment.

Irrespective of the motive of its sponsors, the concept of circumvention and evasion inherent in OES Regulation 1 clashes with the constitutional concept of Congress as the lawmaking body of the Nation, and should not be sanctioned by the courts.

II.

It Is Only Upon the Theory That the Rule, That Circumstantial Evidence When Relied on to Support a Conviction Must Exclude Every Rational Hypothesis Except Guilt, Is a Mere Admonition to the Jury, and Not a Rule to Be Applied By the Trial or Appellate Court, That the Circumstances Herein, Explainable on a Reasonable Theory of Innocence, Can Be Held Sufficient to Support the Verdict of Guilty. On This Point There Is a Direct Conflict Between the Decisions of the Second Circuit and Those of a Majority of the Other Circuits, and It Is Clear From the Reasoning of the Circuit Court of Appeals Herein That It Applied the Rule Pronounced in the Second Circuit Instead of Following the Majority Rule. This Is an Important Question That Has Not Been Decided But Should Be Decided By This Court. Irrespective, However, of Any Difference Between the Majority and the Minority Rule, the Circumstances Herein Do Not Constitute Substantial Evidence of Guilt.

Guilt, of course, need not be proved by direct evidence but may be inferred from a "development and collocation of circumstances" (Glasser v. U. S., 315 U. S. 60, 80), but the circumstances must be consistent with each other, consistent with the hypothesis that the accused is guilty and at the same time inconsistent with the hypothesis that he is innocent (Leslie v. United States, 10th Cir., 43 F. 2d 288, 289). The Circuit Court of Appeals did not test the circumstances herein by this rule.

We quote from the opinion (R. 116, 117) as follows:

> "It was established that appellant was the owner of the meat business and controlled two retail meat shops and leased the cooler where the unlabeled meat was found. The cooler was about 75 feet from one

> market and 250 feet from the other. There is a substantial inference that appellant deliberately absented himself on Monday morning, necessitating a wait at the cooler by the agents for a matter of two hours, and finally, entry by way of a window. There were at least three skinned carcasses in the cooler which had been in the process of being cut into roasts, etc. One piece of meat was even wrapped up and had a name and address on it. There was ample evidence of substantial activity with unlabeled meats on the part of some one. Appellant's employees had access to the cooler and there was no evidence that any one else had unsupervised access thereto. There is a strong inference that appellant's employees, then, were working the meat. It is most unlikely that any one of those employees could have used the cooler and have done that volume of butchering without the fact coming to appellant's ears. It is more likely that they were working at appellant's direction."

(1) Petitioner's lease of the cooler is the first circumstance emphasized in the foregoing quotation from the opinion of the Circuit Court of Appeals.

Petitioner did not have actual, personal, exclusive possession of this meat. His possession thereof was constructive only. He had access to the cooler; so did his employees. The storage room containing this cooler could be entered through a window. The cooler was therefore accessible to any tenant in the back building. Consequently, petitioner's constructive possession was not enough to establish the inference of guilty knowledge (Fosse v. United States, 9th Cir., 44 F. 2d 915, 918; United States v. Russo, 3rd Cir., 123 F. 2d 420, 422; People v. Kubulis, 296 Ill. 523, 131 N. E. 595, 596; Gossett v. Commonwealth, 262 Ky. 540, 90 S. W. 2d 730, 731; Underhill on Criminal Evidence, 2nd Ed., #300, p. 527). The rule pronounced in these cases, involving, in the main, the possession of stolen

property, is equally applicable here.[1] Compare Bollenbach v. United States, decided by this Court January 28, 1946, 90 L. Ed. 318, 321 (Advance Sheet No. 7).

(2) The second circumstance, or pair of related circumstances, referred to by the Circuit Court of Appeals as evidence of guilt, is petitioner's absence on Monday morning and his leaving the markets on Saturday afternoon, while the cooler in another building was being examined.

There was nothing unusual in petitioner's leaving or being absent from his markets. He was not requested to accompany the inspectors when they examined the cooler nor to await their return. It is only by inferring guilty knowledge from his constructive possession of the meat that any inference of guilt can be drawn from his leaving the market on Saturday. To do this would violate the established federal rule that an inference may not be drawn from another inference nor a presumption rested on the basis of another presumption.[2]

Petitioner's absence on Monday morning, even though he may have received the message Thomas was instructed to deliver to him, is without probative force unless peti-

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1 "Underhill states in his Criminal Evidence, 3d Ed., 1923, §469, that 'A mere constructive possession is not enough. * * *' And in Zoline's Federal Criminal Law and Procedure (1921) it is said in §324 that 'A constructive possession is not sufficient to hold a person responsible on a criminal charge'" (U. S. v. Russo, supra).

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"* * * it is obvious that if the mere possession is sufficient to convict, the innocent are as likely to suffer as the guilty. There are many cases in which an explanation would be impossible; and in such cases to throw the burden of explanation upon the accused would be to slam the door of justice in his face. We think the true rule upon the subject is that laid down by Greenleaf in the section referred to. 'It will be necessary,' says he, 'for the prosecutor to add the proof of other circumstances indicative of guilt in order to render the naked possession of the thing, available toward a conviction'" (Fosse v. U. S., supra).

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"* * * If other persons have equal right and facility of access with him (the accused) to a room, trunk or closet where stolen goods are discovered, possession, not being exclusive or personal, is of no value as evidence." Underhill on Criminal Evidence, 2nd Ed., Sec. 300, p. 527.

2 Ross v. United States, 92 U. S. 281; Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472; Brady v. United States, 8th Cir., 24 Fed. 399.

tioner thereby intended to avoid arrest and prevent an investigation of his responsibility, if any, for the meat. There is not a scintilla of evidence of either purpose.[3] Petitioner did not leave the jurisdiction nor remain away from his business indefinitely. He was there when it was again visited by the inspectors. Moreover, he gave a reasonable explanation for his absence and, in connection with that explanation, denied any knowledge of, connection with, or responsibility for the meat found in the cooler. There is no impeachment of this explanation.

A flight may be considered as a circumstance indicative of guilt but there is a difference between mere absence and leaving and a flight. Flight, in criminal law, is defined as:

> "• • • 'the evading of the course of justice by voluntarily withdrawing oneself in order to avoid arrest or detention, or the institution or continuance of criminal proceedings. The term signifies, in legal parlance, not merely a leaving, but a leaving or concealment under a consciousness of guilt and for the purpose of evading arrest. Such consciousness and purpose is that which gives to the act of leaving its real incriminating character.' "[4]

The principle stated in this definition is generally recognized and applied by the courts. Alberty v. United States, 162 U. S. 511; People v. Stilwell, 244 N. Y. 196, 155 N. E. 98, 99; Ryan v. People, 79 N. Y. 583, cited with approval in Alberty v. United States, supra.

(3) The Court inferred from the quantity of meat, and the condition thereof, found in the cooler, that employees of petitioner were working the meat.

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[3] There is no evidence that petitioner was arrested until after the filing of the first information herein July 5, 1945.

[4] People v. Autman (Ill.), 65 N. E. 2d 772, 774 (Advance Sheets, April 24, 1946).

This is not a legitimate inference but a mere speculation. Had there been evidence of frequent deliveries of meat to this cooler or that butchering operations extended over a substantial period of time, there might be some basis for such an inference, but there is no such evidence.

It is improbable that this meat could have been delivered in the daytime without such delivery being observed by some occupant of the building in which the cooler was located. It is reasonable to presume that the Government made an investigation on that point. If delivered at night and received by persons other than petitioner or his employees, the probability of discovery would have been no greater and the risk of punishment much less than if the meat had been obtained at the instance of petitioner or one of his employees.

The conclusion of the Circuit Court of Appeals on the point under consideration is not deduction but speculation.

(4) The Circuit Court of Appeals, upon uncertain premises, draws the inference that petitioner's employees were working this meat. Upon that inference it rests the further inference that they were doing this work at petitioner's "direction." This holding, if not a pure speculation, is a violation of the rule that circumstances, relied upon to support an inference, must be directly proven and may not be presumed from other circumstances. Authorities supra.

In reaching its conclusion that petitioner was responsible for any acts of his employees with respect to the ungraded meat, the Circuit Court of Appeals disregarded the well-settled rule that the mere relation of principal and agent or of master and servant does not render the principal or master criminally liable for the acts of his agent or servant although done in the course of the employment, unless it be shown that such were directed or authorized by the principal or master. There is no pre-

sumption of authority to commit a criminal act. United States v. Food & Grocery Bureau etc., 43 Fed. Supp. 966, 971, and cases therein cited; State v. Carmean, 126 Iowa 291, 102 N. W. 97;[5] Caldwell v. State, 164 Tenn. 325, 335, 336, 48 S. W. 2d 1087.

Considered individually or collectively, and viewing them in the light most favorable to the Government, the circumstances under discussion do not constitute substantial evidence of guilt but, at most, only establish guilt as a plausible conjecture and this is not enough.

It is a fundamental rule in all jurisdictions that circumstantial evidence should be acted upon with caution and should exclude every other reasonable theory or hypothesis except that of guilt. Wharton on Criminal Evidence, 11th Ed., Vol. 2, Sec. 922. The same author, Vol. 2, Sec. 883, says:

> "Verdicts may be rendered upon rightful inference arising from the evidence, as well as upon direct testimony, but any conclusion reasonably to be drawn from the evidence, which is consistent with the innocence of the accused, must prevail."

In Jones on Evidence, 2d Ed., Vol. 1, Sec. 12, p. 23, the author, stating the distinction between the circumstantial evidence rule as applied to civil and criminal cases, says that in the latter "the circumstances proved must be susceptible of explanation upon no reasonable hypothesis consistent with the innocence of the accused."

In 23 C. J. S., Sec. 907, pp. 152, 153, the rule, specifically applicable to the instant case, is thus concisely stated:

> **"If the circumstantial facts proved can be reconciled either with the theory of innocence or with the**

[5] "* * * It is well settled that a principal is not thus liable for the acts of his agent or servant even though done in the general course of employment, unless they are directly authorized or consented to by him; for the authority to do a criminal act will not be presumed." (Emphasis ours.) State v. Carmean, supra.

theory of guilt, the theory of innocence must be adopted and a conviction cannot be sustained, even though the theory of guilt is the more probable. So, also, however strong the circumstances, if they can be reconciled with the theory that some person other than accused may have done the act charged, or that no crime has been committed, a conviction cannot be sustained." (Emphasis ours.)

The rule, above stated in varying language, is supported without substantial conflict by the authorities. In its application, a difference of opinion has arisen as to whether the rule should govern a reviewing court as well as a jury.

Petitioner, in his brief in the Circuit Court of Appeals, contended that the case should be reversed if the circumstances, taken together, were as consistent with innocence as with guilt. Government counsel, in their brief, suggested that this was possibly a misinterpretation of the rule, and that it meant "no more than that a jury should not be allowed to speculate as to a defendant's guilt • • •." Government brief, Circuit Court of Appeals, p. 18.

The Circuit Court of Appeals, in terms, did not adopt the apparent Government view that where inferences consistent with guilt and also consistent with innocence may reasonably be drawn from proven circumstances in a criminal case, a jury question is presented and its verdict conclusive. But considering actualities, there is no doubt that the Court concurred in that view.

At one time or another, all the circuit courts of appeal[6]

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[6] Rivera v. U. S., 1st Cir., 57 F. 2d 816, 822;
Yoffe v. U. S., 1st Cir., 153 F. 2d (Ad. Shts.) 570, 572, 573;
Nosowitz v. United States, 2nd Cir., 282 Fed. 575;
Yusen v. U. S., 3rd Cir., 8 F. 2d 6, 8;
U. S. v. Laffman, 3rd Cir., 152 F. 2d 393, 394;
U. S. v. Russo, 3rd Cir., 123 F. 2d 420, 422;
Garst v. United States, 4th Cir., 180 Fed. 339;
Kassin v. U. S., 5th Cir., 87 F. 2d 183-185;
Hamner v. U. S., 5th Cir., 134 F. 2d 592, 596;
Harrison v. U. S., 6th Cir., 200 Fed. 662, 664;
N. Y. Life Ins. Co. v. Roufos, 6th Cir., 83 F. 2d 621, 623;

have held that a conviction should be reversed where the circumstances were explainable upon a reasonable theory of innocence and that the determination of whether the circumstances excluded every rational theory but guilt was a question of law for the court. State decisions are in accord with this rule.[7]

The Circuit Court of Appeals for the Second Circuit has repudiated the rule that where there are two reasonable hypotheses arising from circumstantial evidence, one consistent with innocence and the other consistent with guilt, it is the duty of a reviewing court to reverse the judgment of conviction. United States v. Picarelli, 2nd Cir., 148 F. 2d 997, 998; United States v. Feinberg, 2nd Cir., 140 F. 2d 592, 594; United States v. Valenti, 2nd Cir., 134 F. 2d 362, 364; United States v. Becker, 2nd Cir., 62 F. 2d 1007, 1010.

These decisions do not expressly overrule Nosowitz v. United States, 2nd Cir., 282 Fed. 575, applying the majority rule, but the holding therein cannot be reconciled

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Cf. Mescall v. W. T. Grant Co., 7th Cir., 133 F. 2d 209, 211;
Karchmar v. U. S., 7th Cir., 61 F. 2d 623;

Union Pacific Coal Co. v. U. S., 8th Cir., 173 Fed. 734, 740;
Isbell v. U. S., 8th Cir., 227 Fed. 788, 790, 792, 793;
Turinetti v. U. S., 8th Cir., 2 F. 2d 15, 17;
Beal v. U. S., 8th Cir., 32 F. 2d 1002, 1003;
Neal v. U. S., 8th Cir., 102 F. 2d 643, 648;

Lemple v. U. S., 9th Cir., 39 F. 2d 19;
Fosse v. U. S., 9th Cir., 44 F. 2d 915, 918;

Leslie v. U. S., 10th Cir., 43 F. 2d 288, 289;
Scott v. U. S., 10th Cir., 145 F. 2d 405, 408;

Sleight v. U. S., D. C. App., 82 F. 2d 459, 461.

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7 Thompson v. State, 83 Miss. 301, 35 So. 689, 690;
State v. Madden, 212 N. C. 56, 192 S. E. 859, 860;
People v. Burgard, 377 Ill. 302, 36 N. E. 2d 558, 561, 562;
People v. Bearden, 290 N. Y. 478, 49 N. E. 2d 785, 788;
State v. Alevius, Ohio Ct. of Appeals, Clark Co., 66 N. E. 2d 243, 248 (Adv. Sheets, May 15, 1946);
Fyffe v. Commonwealth, 301 Ky. 165, 190 S. W. 2d 667, 679, 680;
Wilson v. Commonwealth, 285 Ky. 136, 147 S. W. 2d 62, 63;
Burton v. Commonwealth, 108 Va. 892, 899, 62 S. E. 376, 379;
Commonwealth v. Bausewine (Pa.), 46 A. 2d 491, 493 (Adv. Shts., May 4, 1946);
People v. Flores, 58 Cal. App. 2d 764, 769, 137 P. 2d 767;
People v. Vollman (Cal.), 167 P. 2d 545 (Adv. Shts., May 3, 1946).

with that case. In accord with the later decisions of the Second Circuit are two recent state cases, State v. Murphy, 124 Conn. 554 (cited in U. S. v. Valenti), 1 A. 2d 274, 278, and Mandich v. State (Ind.), 66 N. E. 2d 69, 71 (Advance Sheet May 1, 1946).

The cases thus repudiating the majority rule hold, in substance, that it has no application on appeal but is only a direction to the jury.

The decisions of the Second Circuit have also apparently limited the application of the majority rule as it governs instructions to the jury, holding (1) that the standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases (United States v. Picarelli, supra; United States v. Feinberg, supra) and (2) that the jury need not be instructed that it should draw the inference from the circumstances most favorable to the accused (United States v. Valenti, supra).

As to the first of the limitations, some of the cases make no distinction between circumstantial evidence in civil and in criminal actions but these decisions generally hold that where equally permissible inferences may be drawn from the testimony there is no substantial evidence of either or, as more frequently expressed, that where the evidence is equally consistent with two conflicting hypotheses it tends to establish neither. P. F. Collier & Sons Co. v. Hartfeil, 8th Cir., 72 F. 2d 625, 630, and cases therein cited, including numerous decisions of this Court; New York L. Ins. Co. v. Roufos, 6th Cir., 83 F. 2d 621, 623; Galloway v. United States, 9th Cir., 130 F. 2d 467, 470, affirmed by this Court, 319 U. S. 372.

Other authorities hold that in civil actions "proof of circumstances warranting a given inference is sufficient" and that the circumstances need not exclude every other reasonable conclusion than that arrived at by the jury. Leek v. New South Express Lines, 192 S. C. 527, 7 S. E.

2d 459, 462; Jones on Evidence, 2nd Ed., Vol. 1, Sec. 12, p. 23. But the basis of this rule is the difference in the measure of persuasion required in civil and in criminal cases.

In a well considered criminal case, State v. Gregory, 339 Mo. 133, 96 S. W. 2d 47, 52, 53, the court, after defining substantial evidence, in accord with decisions of this court cited in the opinion, emphasized the importance of the degree of persuasion required in determining whether a case should be submitted to the jury, saying:

> "Now, since the test of substantial evidence is whether a jury reasonably could find the issue thereon, the result must depend in some measure on the degree of persuasion required. * * * It would be an incongruous situation if the court were compelled to let a conviction stand as being supported by evidence warranting a verdict of guilty beyond a reasonable doubt, when for any reason made manifest on the record the evidence could not reasonably support a conviction. In so holding we are not to be understood as departing from the rule announced in the long line of recent cases cited above that this court will not weigh the evidence in a criminal case if the verdict below was supported by substantial evidence. This rule presupposes that there was evidence from which the jury reasonably could have returned a verdict of guilty."

As to the second limitation, above referred to, it is in conflict with many state and federal decisions which hold that where "acts or circumstances are attributable to either an innocent or a criminal cause, the innocent hypothesis" should be adopted. People v. Burgard, 377 Ill. 322, 36 N. E. 2d 558, 561, 562; State v. Madden, 212 N. C. 56, 192 S. E. 859, 860; Thompson v. State, 43 Miss. 287, 35 So. 689, 690; Burton & Conquest v. Commonwealth, 108 Va. 892, 899, 62 S. E. 376, 379; People v. Vollman (Calif.), 167 P. 2d 545, 559 (Advance Sheet, May 3, 1946);

Ramsey v. Ryerson, 40 Fed. 739, 743; Turinetti v. United States, 8th Cir., 2 F. 2d 15, 17. In the last cited case, the court said:

> "Whenever a circumstance, relied on as evidence of criminal guilt, is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value even though from the other inference guilt may be fairly deducible."

In Leslie v. United States, 10th Cir., 43 F. 2d 288, the court said:

> "The court must direct a verdict if no substantial proof of guilt is offered. When the proof rests on circumstances which lend as rationally to the conclusion of innocence as of guilt, there is not proof of guilt and nothing to go to the jury."

In People v. Flores, 58 Calif. App. 2d 764, 769, 137 P. 2d 767, 770, the court said:

> "Ordinarily, the deduction to be drawn from the circumstances shown in evidence is for the trier of facts, but in this instance it is manifest that every fact proven is consistent with the reasonable conclusion that the appellant did not participate in the theft of the automobile. There is, therefore, a failure of proof in particulars necessary to conviction of the crime of grand theft, and the question is one of law for the court. * * * As is well said by the learned author of Wharton's Criminal Evidence (volume 2, #915), 'circumstances, trivial in themselves, take on an exaggerated character the moment that suspicion is directed toward a person accused of a crime; and because of this tendency, no circumstances should be admitted that cannot be shown to have a direct and obvious relevancy to the crime charged.' While the fact that an accused person has an opportunity to commit the crime with which he is charged may be a circumstance from which, in conjunction with other circumstances, guilt may be conjectured or inferred,

it is nevertheless an established precept of law that an incriminating circumstance from which guilt may be inferred must not rest on conjecture. And by the same rule it is not permissible to pile conjecture upon conjecture."

The fallacy of the conclusion reached in the decisions of the Court of Appeals for the Second Circuit and a few state cases in accord is clearly shown by the inexorable logic and sound reasoning of the Circuit Court of Appeals for the Eighth Circuit in Isbell v. United States, 227 F. 788, 790-793, and we quote therefrom as follows:

"There was a legal presumption that he was innocent until he was proved to be guilty beyond a reasonable doubt. 'Evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him'. (Citing many authorities) * * *

"The criticism of the first clause of the last sentence quoted, that under it the trial court must necessarily pass upon the weight of the evidence and the credibility of the witnesses, and that it is equivalent to saying that unless the trial judge believes the defendant guilty beyond a reasonable doubt he must direct a verdict of acquittal, has not been deemed sound for the following reasons: It is certain that evidence of facts as consistent with innocence as with guilt is not sufficient to sustain a conviction, and that at the close of every trial by jury it is the duty of the court upon request to consider and determine whether or not there is any substantial evidence of the guilt of the accused, and, if there is none, to instruct the jury to return a verdict for the defendant. If there is, at

> the conclusion of a trial, no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, for facts consistent with his innocence are never evidence of his guilt. Nor does the duty of the court to consider and determine whether or not there is substantial evidence of facts which exclude every other hypothesis but that of guilt require the court, in our opinion, to pass upon the weight of the evidence, the credibility of the witnesses, or to direct an acquittal unless he believes the defendant guilty beyond a reasonable doubt. It requires nothing of him but the performance of the ordinary duty which, upon request, devolves upon him in every jury trial, the duty to determine whether or not at the close of the trial there is any substantial evidence against the defendant, and if there is none to direct a verdict in his favor."

This Court, in Pierce v. United States, 252 U. S. 239, 251, held that the determinative question on appeal was whether there was "substantial evidence in support of charges" and that the "question of whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide", but, as shown in Isbell v. United States, supra, the latter is a materially different question from that involved in determining whether there is substantial evidence from which a jury could properly find or infer beyond a reasonable doubt the guilt or innocence of the accused, which is a question of law for the court.

In United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 254, the court said:

> "Respondent McElroy argues that the judgment of conviction rendered against him should be reversed and the indictment dismissed not only for the reasons heretofore discussed, but more specifically on the grounds that there was no substantial evidence that

he had any knowledge of and participated in the unlawful conspiracy. His motion for a directed verdict at the conclusion of the case was denied by the trial court and the Circuit Court of Appeals held that there was no error in such denial. A question of law is thus raised, which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict. Abrams v. United States, 250 U. S. 616, 619, 63 L. Ed. 1173, 1175, 40 S. Ct. 17; Troxell v. Delaware, L. & W. R. Co. 227 U. S. 434, 444, 57 L. Ed. 586, 591, 33 S. Ct. 274; Lancaster v. Collins, 115 U. S. 222, 225, 29 L. Ed. 373, 374, 6 S. Ct. 33. We have carefully reviewed the record for evidence of McElroy's knowledge of and participation in the conspiracy."

In Mortensen v. United States, 322 U. S. 369, 374, the court said:

> "Since the issue as to whether petitioners intended that the two girls should resume their immoral conduct on their return to Grand Island and transported them in interstate commerce for that purpose was submitted to the jury with appropriate instructions we would normally be precluded from reviewing or disturbing the inferences of fact drawn from the evidence by the jury. But we have never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict. Cf. Abrams v. United States, 250 U. S. 616, 619, 40 S. Ct. 17, 18, 63 L. Ed. 1173. Our examination of the record in this case convinces us that there was a complete lack of relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt, that petitioners transported the girls in interstate commerce 'for the purpose of prostitution or debauchery' within the meaning of the Mann Act."

On principle, the language above quoted from Mortensen v. United States is in accord with the majority rule and in conflict with the rule pronounced in the Second Circuit and apparently followed in the instant case but the precise point here involved has not been adjudicated by this Court.

In emphasizing our contention that the Circuit Court of Appeals in this case has practically, if not theoretically, followed the rule pronunced in the Second Circuit, reference is made to Myers v. United States, 6th Cir., 94 F. 2d 433, cited in the Government's brief in the Circuit Court of Appeals. In that case and in a later case, Braverman v. United States, 125 F. 2d 283, 285, each being a conspiracy case, the court held: "The jury having found guilt, slight evidence connecting a defendant with a conspiracy may be substantial and, if it is, is sufficient." The rule thus pronounced extends the function of the jury further than has been done by the cases from the Second Circuit heretofore cited.

It is a principle deep rooted in our traditions that the jury is the "fact-finding body in criminal cases" (Patton v. United States, 281 U. S. 276) but the theory upon which "slight" evidence could be converted into "substantial" evidence by a jury verdict is not intimated by the opinions in Myers v. United States, supra, and Braverman v. United States, supra.

Evidence is either "substantial" or it is not, and, this being a question of law, the jury has nothing to do with it. In determining that question, the rule, that the jury passes on the credibility of witnesses, has no application, and particularly in a case where, as here, there is no conflict in the evidence. Beal v. United States, 8th Cir., 32 F. 2d 1002, 1003.

The probative sufficiency of the evidence is a question of law for the court; its weight a question of fact for the jury. The line between their respective functions is some-

times shadowy but it is a line that must often be drawn by both trial and reviewing courts, and the conflict and confusion in the cases, heretofore shown, clearly justifies an authoritative and clarifying pronouncement of the applicable rule by this Court.

Pertinent to the point under consideration is the language of the Ohio Court of Appeals (Clark County) in State v. Nevius, 66 N. E. 2d 243, 248 (Advance Sheet, May 15, 1946), which we quote as follows:

> "While circumstantial evidence may satisfactorily prove a fact in issue, that must result from the natural, usual, and logical conclusions to be drawn from the circumstances and cannot be extended beyond that. Findings of fact must be kept within the bounds of rationality. Reasoning cannot be extended beyond the evidence by piling inference upon inference. United States v. Ross, 92 U. S. 281, 23 L. Ed. 707; Sobolovitz v. Lubric Oil Co., 107 Ohio St. 204, 140 N. E. 634; Cunard S. S. Co. v. Kelley, 1 Cir., 126 F. 610.
>
> "Upon this subject of keeping judicial reasoning within the limits of reason, Thayer, in his Preliminary Treatise on Evidence, says at page 208:
>
> " 'Especially has this function come into play in supervising and regulating the exercise of the jury's office. Herein lies one of the most searching and far-reaching occasions for judicial control—that of keeping the jury within the bounds of reason. This duty, as well as that of preserving discipline and order, belongs to the judge in his mere capacity of presiding officer in the exercise of judicature. Reason is not so much a part of the law, as it is the element wherein it lives and works; those who have to administer the law can neither see, nor move, nor breathe without it. Therefore, not merely must the jury's verdict be conformable to legal rules, but it must be defensible in point of sense; it must not be absurd or whimsical.

> This, of course, is a different thing from imposing upon the jury the judge's own private standard of what is reasonable.' "

As conceived by petitioner, and particularly in criminal cases, a conviction resting entirely on circumstantial evidence should be reversed unless guilt is the only conclusion that can be fairly and reasonably drawn from the circumstances. Jones on Evidence, 2nd Ed., Vol. 1, Sec. 12, p. 23; Wharton's Criminal Evidence, 11th Ed., Vol. 2, Sec. 883, p. 1522.

It seems to us that any other rule would cut deeply into the presumption of innocence which, while not evidence in behalf of the accused, is a presumption of law which should be respected by both the judges and the jurors. Dodson v. United States, 4th Cir., 23 F. 2d 401, 402, 403; Miklencic v. United States, 3rd Cir., 62 F. 2d 1044.

In Dodson v. United States, supra, Judge Parker said:

> "• • • The presumption of innocence is one of the fundamentals of the law. It is not to be minimized or denied to anyone accused of crime. Metaphysical disquisitions on the burden of proof may tend only to confusion; the presumption of innocence is simple and easily understood. One accused of crime has the right to have the jury take it to the jury room with them as the voice of the law, saying in effect: 'You are not to guess or speculate as to this man's guilt. He is innocent, unless the evidence convinces you of his guilt to a moral certainty.' This is what the presumption of innocence means; and, as said by Lord Gillies in McKinley's Case, 33 St. Tr. 275, 506, it 'is to be found in every code of law which has reason, and religion, and humanity for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman.' "

III.

In the Absence of Any Direct Evidence as to the Identity of the Person Responsible for the Ungraded Meat That Was Found in the Cooler, Rented by Petitioner, in a Building Separate and Distinct From That in Which His Meat Markets Were Operated and the Evidence That This Cooler Was Accessible to Numerous Persons Other Than Petitioner, It Was Prejudicial Error to Refuse to Instruct the Jury as Requested by Petitioner That It Should Not Speculate as to Which of Two or More Persons Might Be Responsible for the Alleged Crime; and in View of the Omission of the General Charge to Instruct the Jury With Respect to Inferences That Could Be Properly Drawn From the Mere Finding of Unstamped and Ungraded Meat in a Cooler, Rented by Petitioner, in a Building, Separate and Distinct From That in Which His Meat Markets Were Operated; It Was Likewise Error to Refuse to Charge the Jury as Requested by Petitioner That the Finding of Such Meat in This Cooler Was Insufficient in and of Itself to Overcome the Presumption of Innocence to Which He Was Entitled.

The refused special requests, above referred to, appear at page 94 of the record and are as follows:

> No. 8. "At the request of the defendant, the Court further instructs you that you are not allowed to speculate which of two or more individuals might have done or might be responsible for the acts and situations which the Government alleges constitute the violations of the law set forth in the information herein, and that unless the evidence in this cause is such as to establish to your satisfaction, beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis, that the defendant is the particular person who did the things and is wilfully responsible for said alleged acts and conditions as set

forth in said information, it will be your duty to return a verdict of 'not guilty' in favor of defendant."

No. 14. "You are further instructed that the finding of unstamped meat on property that had been previously rented to the defendant is insufficient in and of itself to overcome the presumption of innocence which exists in favor of the defendant; and said fact that defendant failed to take the stand in his own behalf, is insufficient under the law, unless supported by other facts and circumstances tending to establish the guilt of the defendant, to warrant a verdict of guilty in this cause; the finding of said meat on said premises and the failure of the defendant to testify in this case not being sufficient to establish the guilt of the defendant beyond a reasonable doubt as is required by the law."

In a criminal case the court should instruct the jury on all essential questions of law involved, whether requested or not. Calton v. People, 130 U. S. 83; Kinard v. U. S., D. C. App., 96 F. 2d 522; Meadows v. U. S., D. C. App., 82 F. 2d 881; Kreiner v. U. S., 2nd Cir., 11 F. 2d 722; Strader v. U. S., 10th Cir., 72 F. 2d 589; Lamento v. U. S., 8th Cir., 4 F. 2d 901; Bogileno v. U. S., 10th Cir., 38 F. 2d 584.

The accused, upon proper request, is entitled to have his theory of every material issue of fact submitted to the jury under appropriate instructions. Thorwegan v. King, 111 U. S. 549; McDonald v. U. S., 6th Cir., 241 F. 793, 799; Western Union Tel. Co. v. Morris, 8th Cir., 105 F. 49, 53; Memphis Street Railway Co. v. Newman, 108 Tenn. 666, 669, 69 S. W. 269. And if a special request, although not technically accurate, directs the attention of the court to a material point not covered by the general charge, an appropriate instruction should be given on that point. McDonald v. U. S., 6th Cir., 241 F. 793, 799; Richardson v. U. S., 6th Cir., 150 F. 2d 58, 66.

In Bird v. United States, 180 U. S. 356, the Court states that the defendant "had a right to a full statement of the law from the court" and that the charge should "bring into view the relation of the particular evidence adduced to the particular issue involved."

In Gardner v. State, 196 P. 750, 27 Wyo. 316, 15 A. L. R. 140, the Court held that the jury should have been given an instruction which included this language:

> "If under the evidence in this case any other person might have been guilty of the crime instead of the defendant, you must acquit the defendant."

An application of the foregoing principles to Special Request No. 8 shows that its refusal was plain error.

The refusal of Special Request No. 14 was equally prejudicial. Petitioner's possession of the meat was not actual and exclusive but constructive only, and it is well settled that guilty knowledge may not be inferred from constructive possession alone (U. S. v. Russo, 3rd Cir., 123 F. 2d 420, 422, and authorities therein cited). The jury, while told that the evidence must establish guilty knowledge on the part of petitioner, was not instructed that such knowledge could not be inferred from the mere finding of the ungraded meat in the cooler rented by petitioner or from constructive possession alone, and the refusal of a special request adequately presenting this point was serious error.

CONCLUSION.

Aside from its restriction of the scope of the Taft Amendment within such narrow limits as to nullify for all practical purposes a material provision thereof, and its disregard of established rules in the consideration of the circumstances relied upon to support a conviction, to such an extent as to justify the exercise by this Court of its

power of supervision, the Circuit Court of Appeals sanctioned the action of the trial judge in refusing to give the jury adequate instructions touching the probative value of material evidence, including the testimony concerning the equal opportunity of persons other than petitioner to have committed the alleged offense and the testimony as to the finding of ungraded meat in a cooler rented by petitioner. The general charge gave the jury no instruction at all concerning the probative value of this evidence nor the rules that should govern their deliberations in drawing inferences therefrom, and the refusal of special requests on these points was a denial of petitioner's right to a fair trial. Sunderland v. United States, 8th Cir., 19 F. 2d 204, 216.

Respectfully submitted,

WALTER P. ARMSTRONG,
R. G. DRAPER,
D. L. GERWIN,
L. E. GWINN,
Counsel for Petitioner.

APPENDIX.

OFFICE OF ECONOMIC STABILIZATION

[Regulation 1]

PART 4002—REGULATIONS ON GRADING AND GRADE LABELING

GRADING AND GRADE LABELING OF MEATS

Pursuant to the provisions of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes" (Public Law No. 729, 77th Congress, 2nd Session), Executive Order No. 9250, dated October 3, 1942, and Executive Order No. 9328, dated April 8, 1943, and in order to prevent the breakdown of existing price controls essential to stabilization of the cost of living and to aid in the effective prosecution of the war by preventing dislocations in the distribution of meat and meat products, the following regulation is hereby issued:

§ 4002.1 *Prohibition against dealing in or storing meat unless graded and grade marked.* No person shall sell, offer to sell, ship, deliver, store or retain in his possession and no person in the course of trade or business shall buy or receive any beef, veal, lamb or mutton unless such beef, veal, lamb or mutton has been graded and grade marked in the manner required by this regulation; and no person shall agree, offer, solicit or attempt to do any of the foregoing.

§ 4002.2 *Duty to maintain and identify grades of beef and veal.* No person shall sell, offer to sell, ship, deliver or break, and no person in the course of trade or business shall buy or receive any beef carcass or wholesale cut or veal carcass or wholesale cut unless each such carcass and wholesale cut has been identified by grade in accordance with the provisions of this section. No custom slaughterer shall ship, deliver or break and no person shall receive or accept any beef carcass or wholesale cut or veal carcass or wholesale cut unless such carcass and wholesale cut has been identified by grade in accordance with the provisions of this section. Each person shall maintain uniform grades, as specified in paragraph (a) of this section; shall determine his maximum prices for beef and veal pursuant to Revised Maximum Price Regulation No. 169, Beef and Veal Carcasses and Wholesale Cuts,[1] upon the basis of such uniform grades rather than upon the basis of his own grades, as provided in paragraph (b) of this section; and shall have his products identified by grade designations, as provided by paragraph (c) of this section.

(a) *Uniform grades.* (1) Beef carcasses and the wholesale cuts therein contained derived from steers, heifers and cows shall be graded into the following uniform grades: choice, good, commercial, utility, cutter and canner; except, that no cow carcass or wholesale cut shall be graded choice. Beef carcasses and wholesale cuts derived from bulls and stags shall be graded in the same manner, except that no bull carcass or wholesale cut shall be graded choice or good, and no stag carcass or wholesale cut shall be graded choice. In determining the grade of each beef carcass, the "Specifications for Official United States Standards for Grades of Carcass Beef"[2] set forth in § 1364.528 of Revised Maximum Price Regulation No. 169, Beef and Veal Carcasses and Wholesale Cuts, and incorporated herein by reference, shall be used and the grade of such carcass shall apply to each wholesale cut derived therefrom, except that the specifications therein for the two grades, prime and choice, shall be combined and treated as a single grade, choice, and the specifications therein for the two grades cutter and canner shall be combined and treated as a single grade.

(2) Veal carcasses and the wholesale cuts therein contained shall be graded into the following uniform grades: Choice, good, commercial, utility and cull. In determining the grade of each such carcass the "Specifications for Official United States Standards for Grades of Veal and Calf Carcasses"[3] set forth in § 1364.529 of Revised Maximum Price Regulation No. 169, and incorporated herein by reference, shall be used and the grade of such carcass shall apply to each wholesale cut derived therefrom, except that the specifications therein for the two grades, prime and choice, shall be combined and treated as a single grade, choice.

(b) *Duty to determine maximum prices on the basis of uniform grades.* The word "grade" as used in this section means any uniform grade referred to in paragraph (a) of this section and shall not be construed to mean the private grade of an individual seller.

Irrespective of the private grading system heretofore used by the seller, it shall be the duty of the seller, except as provided in paragraph (c) (3) to have classified into the uniform grades provided for in paragraph (a) of this section, by an official grader of the United States Department of Agriculture, the beef carcasses and beef wholesale cuts of cattle and the veal carcasses and veal wholesale cuts of calves slaughtered by the seller or sold by the seller, and then to determine the maximum price for each grade of beef carcass and beef wholesale cut by reference to §§ 1364.451 and 1364.452 of Revised Maximum Price Regulation No. 169 and for each grade of veal carcass and veal wholesale cut by reference to §§ 1364.466 and 1364.467 of revised Maximum Price Regulation No. 169.

(c) *Duty to identify products by grade marks.* (1) No person shall sell, offer to sell, ship, deliver or break any beef or veal carcass unless a stamp has been placed thereon with harmless marking fluid conforming to the formula for violet branding fluid approved by the United States Department of Agriculture, Bureau of Animal Industry, set forth in § 1364.526 of Revised Maximum Price Regulation No. 169, and incorporated herein by reference, marking the appropriate grade letter, as hereinafter designated, in such manner as to identify by such letter the uniform grade of each beef wholesale cut or veal wholesale cut, which may be derived from the carcass, except that in the case of a calf or veal carcass sold with the skin on, the grade letter shall be stamped only on the shanks and briskets. The purchaser of a calf or veal carcass with the skin on shall not sell, offer to sell, ship or break such carcass after removal of the skin unless a stamp has been placed thereon, marking the appropriate grade letter, as hereinafter designated, in such manner as to identify by such letter the uniform grade of each veal wholesale cut which may be derived from such carcass.

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1 8 F.R. 4097, 4787, 4844, 5170, 5478, 5634, 6058, 6427, 7109, 6945, 7199, 7200, 8011, 8677, 8756, 9066, 9300, 9995.

2 Service and Regulatory Announcement No. 99, Official United States Standards for the Grades of Carcass Beef, United States Department of Agriculture, Food Distribution Administration, issued as amended May, 1942.

3 Service and Regulatory Announcement No. 114, Official United States Standards for Grades of Veal and Calf Carcasses, United States Department of Agriculture, Food Distribution Administration, issued as amended October, 1940.

The term "bull" or "stag" as the case may be shall be similarly stamped on all bull and stag carcasses and wholesale cuts. The grade and prescribed sex identification of each beef carcass and wholesale cut and veal carcass and wholesale cut must appear on the seller's invoice.

(2) The appropriate grade letter for each uniform grade shall be as follows:

Beef grade	Grade letter	Veal grade
Choice	AA	Choice.
Good	A	Good.
Commercial	B	Commercial.
Utility	C	Utility.
Cutter and Canner	D	Cull.

The grade letter shall be at least ½ inch in height and width. In stamping any beef or veal carcass determined by an official grader of the United States Department of Agriculture to conform to the grade standards contained in Revised Maximum Price Regulation No. 169, such official grader may use the grade designations U. S. choice or choice, U. S. good or good, U. S. commercial or commercial, U. S. utility or utility, U. S. cutter or cutter, U. S. canner or canner, U. S. cull or cull, whichever is appropriate, in lieu of the grade letters established in the subparagraph.

(3) (i) No person shall sell, offer to sell, ship, deliver or break any beef or veal carcass irrespective of grade unless such carcass has been examined and graded by an official grader of the United States Department of Agriculture in accordance with the "Rules and Regulations of the Secretary of Agriculture Governing the Grading and Certification of Meats, etc." [4] as modified to the extent set forth in § 1364.527 of Revised Maximum Price Regulation No. 169, which is incorporated herein by reference, and unless a stamp has been placed upon such carcass by such official grader in the manner set forth in paragraph (c) (1) of this section: *Provided*, That in any instance where any person is unable to procure the services of an official grader within 24 hours after such person has made an application for grading, pursuant to section 3 of Regulation No. 4 (Grading Service) contained in § 1364.527 of Revised Maximum Price Regulation No. 169, then the provisions of this subparagraph shall not apply, for so long a period as the Food Distribution Administration of the United States Department of Agriculture certifies in writing that it is unable to provide such person with the services of an official grader. During such period such beef and veal carcasses shall be graded by the slaughterer in the manner provided in paragraphs (a), (b), (c) (1) and (c) (2) of this section.

(ii) If the slaughterer is a farm slaughterer or if he is primarily the resident operator of a farm engaging only casually, and not as a business, in slaughtering cattle or calves as a service for others, he shall not be required to have the cattle or calves slaughtered by him graded by an official grader of the United States Department of Agriculture. Such beef or veal as is sold by such slaughterer or is slaughtered by him as a service for sale by others shall be graded by him in accordance with the requirements of paragraphs (a), (b), (c) (1) and (c) (2) of this section.

"Farm slaughterer" as used in this subparagraph (c) (3) (ii) and in § 4002.3 (c), means a person chiefly engaged in producing agricultural products as the resident operator of a farm, who did not deliver meat in 1941 of a live weight of more than 10,000 pounds and whose current slaughter is not in excess of that permitted such slaughterers under Food Distribution Order No. 27 [5] or any superseding order.

(4) Whenever any person having a financial interest in any beef or veal carcass which has been graded and grade stamped by an official grader pursuant to paragraph (c) (3) hereof or otherwise, is dissatisfied with the determination of such official grader, such person may appeal the grading and grade stamping by making an application for appeal grading in the manner provided in Regulation No. 5 (Appeal grading) contained in § 1364.527 of Revised Maximum Price Regulation No. 169, and shall thereafter give immediate notice in writing to the Office of Price Administration at Washington, D. C., of such appeal.

(d) *Use of other grading and branding systems.* Any seller may use a private grading and branding system in addition to that required by the foregoing paragraphs of this section: *Provided*, That he shall identify his private grading and branding system in such manner as to distinguish it from the official grade stamp as required by paragraph (c) of this section.

§ 4002.3 *Duty to maintain and identify grades of lamb and mutton.* No person shall sell, offer to sell, ship, deliver or break and no person in the course of trade or business shall buy or receive any lamb or mutton carcass or cut unless it has been identified by grade and marked in accordance with the provisions of this section. Each person shall maintain uniform grades, as specified in paragraph (a) of this section; shall determine his maximum prices for lamb and mutton pursuant to Revised Maximum Price Regulation No. 239, Lamb and Mutton Carcasses and Cuts at Wholesale and Retail,[6] upon the basis of such uniform grades rather than upon the basis of his own grades; and shall have his products identified by grade designations, as provided by paragraph (a) of this section.

(a) Except as otherwise provided in paragraphs (b) and (c) of this section, it shall be the duty of each person to have all lambs, including yearlings, and all sheep slaughtered by or for him, or sold by him, classified by an official grader of the United States Department of Agriculture in accordance with the "Rules and Regulations of the Secretary of Agriculture Governing the Grading and Certification of Meats, etc.," (§ 1364.527, Revised Maximum Price Regulation No. 169). Each carcass shall be classified into one of the grades set out in column I below and marked with harmless marking fluid with the grade designation set out in column II, if classified by an official grader, or the grade letter set out in column III, such grade letter to be at least ½ inch in height and width, if classified by anyone other than an official grader pursuant to paragraph (b) of this section. Where the grade designation set out in column II is stamped on the carcass, there shall also be stamped the word "yearling" if the carcass being graded is that of a yearling, and the word "mutton" if that of a mature sheep. The carcass shall be marked in such a manner as to result in each wholesale cut being identified by grade.

Column I	Column II	Column III
Lamb:		
Choice or better	Choice	AA
Good	Good	A
Commercial	Commercial	B
Utility	Utility	C
Cull	Cull	C
Yearling:		
Choice or better	Choice	A
Good	Good	B
Commercial	Commercial	C
Utility	Utility	C
Cull	Cull	C
Mutton:		
Choice or better	Choice	S
Good	Good	S
Commercial	Commercial	M
Utility	Utility	R
Cull	Cull	R

The "Specifications for Official United States Standards for Grades of Lamb Carcasses, Yearling Mutton Carcasses" set forth in § 1364.185 of Revised Maximum Price Regulation No. 239, Lamb and Mutton Carcasses and Cuts at Wholesale and Retail, and incorporated herein by reference, determine the proper classification of each carcass, except that no mutton buck may be graded higher than commercial.

The harmless marking fluid used in marking the carcass shall conform to the formula for violet branding fluid approved by the United States Department of Agriculture, Bureau of Animal Industry, set forth in § 1364.526 of Revised Maximum Price Regulation No. 169.

(b) In any instance where any person is unable to procure the services of an official grader within 24 hours after such person has made an application for grading, pursuant to section 3 of Regulation No. 4 (Grading Service) (§ 1364.527, Revised Maximum Price Regulation No.

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[4] Service and Regulatory Announcement No .98 (Revised), Rules and Regulations of the Secretary of Agriculture Governing the Grading and Certification of Meats, Prepared Meats, Meat Food Products, and Meat By-Products for Class, Quality (Grade) and Condition, United States Department of Agriculture, Food Distribution Administration, issued as amended September 26, 1942.

[5] 8 F.R. 2785.

[6] 7 F.R. 10688, 8 F.R. 3589, 4786, 7679, 8677, 9066.

169), then such person shall not be required to have the lamb or sheep slaughtered by, or for him, or sold by him, graded by an official grader of the United States Department of Agriculture for so long a period as the Food Distribution Administration of the United States Department of Agriculture certifies in writing that it is unable to provide such person with the services of an official grader. During such period, such lamb or mutton carcasses shall be graded by such person in accordance with the requirements of paragraph (a) of this section.

(c) If the slaughterer is a farm slaughterer or if he is primarily the resident operator of a farm engaging only casually, and not as a business, in slaughtering sheep or lamb as a service for others, he shall not be required to have the lamb or sheep slaughtered by him graded by an official grader of the United States Department of Agriculture. Such lamb or mutton as is sold by such slaughterer, or is slaughtered by him as a service for sale by others, shall be graded by him in accordance with the requirements of paragraph (a) of this section.

(d) Whenever any person having a financial interest in any lamb or mutton carcass which has been graded and grade stamped by an official grader pursuant to paragraph (b) hereof or otherwise, is dissatisfied with the determination of such official grader, such person may appeal the grading and grade stamping by making an application for appeal grading in the manner provided in Regulation No. 5 (Appeal grading) contained in § 1364.527 of Revised Maximum Price Regulation No. 169, and shall thereafter give immediate notice in writing to the Office of Price Administration at Washington, D. C., of such appeal.

(e) *Use of other grading and branding systems.* Any person may use a private grading and branding system in addition to that required by the foregoing paragraphs of this section: *Provided*, That he shall identify his private grading and branding system in such manner as to distinguish it from the grade stamps required by paragraphs (a), (b) and (c) of this section.

(f) Each invoice, sales slip or other memorandum of sale covering sales of lamb or mutton carcasses, wholesale cuts or hotel supply cuts shall show the grade and age classification of each lamb or mutton carcass or cut sold.

§ 4002.4 *Provisions applicable to sellers of beef, veal, lamb or mutton at retail.* No retail seller shall sell, offer to sell, deliver, store or retain in his possession any beef, veal, lamb or mutton unless such beef, veal, lamb or mutton has been graded, grade marked and/or designated as hereinafter set forth:

(1) All carcasses and wholesale cuts of beef, veal, lamb and mutton must be graded and must have a mark showing the grade on them, in accordance with §§ 4002.2 (c) (2) and 4002.3 (a). No retail seller shall have in his store refrigerator, cooler or warehouse any meat which does not have the grade name or mark stamped on each wholesale cut.

(2) If any retail seller slaughters the animal himself, he shall have it graded and marked before the carcass is broken in the manner provided by § 4002.2, in the case of beef and veal, and § 4002.3, in the case of lamb and mutton.

(3) No retail seller shall remove the grade mark from any carcass, wholesale cut or retail cut, nor shall he put different grades of meat together in a showcase.

(4) Each grade of meat which shall have been separated in the showcase as required in (3) above, shall be designated by the appropriate official grade, so that customers can see and read it.

(5) Upon request by any customer, the retail seller shall give such customer a receipt showing the date, the retail seller's name and address, the name, weight, and grade of each retail cut sold.

§ 4002.5 *Enforcement.* Persons violating any provisions of this regulation are subject to the criminal penalties provided by Section 11 of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes" and to all other actions, proceedings and penalties provided by law.

§ 4002.6 *Definitions.* (a) When used in this regulation, the term:

(1) "Person" means any individual, corporation, partnership, association or other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any agency of any of the foregoing: *Provided*, That no punishment shall apply to the United States or to any such government, political subdivision or agency.

(2) "Beef," "beef carcass," "beef wholesale cut," "veal," "veal carcass," and "veal wholesale cut" shall have the same meaning ascribed by Revised Maximum Price Regulation No. 169, Beef and Veal Carcasses and Wholesale Cuts.

(3) "Lamb," "yearling lamb," "mutton," "lamb cut," "cut," and "wholesale cut" shall have the same meaning ascribed by Revised Maximum Price Regulation No. 239, Lamb and Mutton Carcasses and Cuts at Wholesale and Retail.

(4) "Sales at retail" means sales to the ultimate consumer: *Provided*, That no wholesaler, processor, packer, slaughterer, branch house, car-route, hotel supply house, commercial user, purveyor of meals, war procurement agency or other government agency shall be deemed to be an ultimate consumer, except that a sale to a purveyor of meals on usual retail terms by a retailer at least 80 percent of whose sales of meat during the preceding calendar month were made to ultimate consumers shall be deemed a sale at retail.

(5) "Retail seller" means a person regularly and generally engaged in making sales at retail.

(6) "Retail meat cut" shall have the same meaning ascribed by Maximum Price Regulation No. 355, Retail Ceiling Prices for Beef, Veal, Lamb and Mutton Cuts and All Variety Meats and Edible By-Products.[7]

(b) Unless the context otherwise requires, other terms used herein:

Applicable to beef and veal shall be subject to the definitions set forth in Revised Maximum Price Regulation No. 169, Beef and Veal Carcasses and Wholesale Cuts;

Applicable to lamb and mutton shall be subject to the definitions set forth in Revised Maximum Price Regulation No. 239, Lamb and Mutton Carcasses and Cuts at Wholesale and Retail; and

Applicable to retail sellers shall be subject to the definitions set forth in Maximum Price Regulation No. 355, Retail Ceiling Prices for Beef, Veal, Lamb and Mutton Cuts and All Variety Meats and Edible By-Products.

§ 4002.7 *Effective date.* This Regulation No. 1 shall become effective August 5, 1943.

Issued this fifth day of August 1943.

FRED M. VINSON,
Economic Stabilization Director.

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7 8 F.R. 4423, 4922, 6214, 6248, 7199, 7827, 8185, 8945, 9366.

OFFICE OF ECONOMIC STABILIZATION

PART 4002—REGULATIONS ON GRADING AND GRADE LABELING

[Regulation 1,[1] Amdt. 1]

GRADING AND GRADE LABELING OF MEATS

A statement of the reasons involved in the issuance of this amendment has been issued simultaneously herewith and filed with the Division of the Federal Register.

Office of Economic Stabilization Regulation No. 1 is amended in the following respects:

1. The last sentence of the first paragraph of § 4002.2 (c) (1) is amended to read as follows:

The purchaser of a calf or veal carcass with the skin on, shall not sell, offer to sell, ship or break such carcass after removal of the skin, unless stamps have been placed thereon in accordance with the provisions of subdivision (3) (i) of this § 4002.2 (c), marking the appropriate grade letter as hereinafter designated in such a manner as to identify by such letter the uniform grade of each veal wholesale cut which may be derived from such carcass.

2. The last sentence of § 4002.2 (c) (3) (i) is amended to read as follows:

During such period such beef and veal carcasses shall be graded by such person in the manner provided in paragraphs (a), (b), (c) (1) and (c) (2) of this section, and shall be marked by such person in such a manner that the grade designation shall appear not more than two inches apart along both sides of the chine bone and continuing down the outside of the round or leg to the beginning of the gambrel cord. The grade marks shall also appear at two-inch intervals along the belly on each side of the carcass, across the shoulder and along the foreshank.

3. The last sentence of § 4002.3 (b) is amended to read as follows:

During such period, such lamb or mutton carcasses shall be graded by such person in accordance with the requirements of paragraph (a) of this section and shall be marked by such person in such a manner that the grade designation shall appear not more than two inches apart along both sides of the chine bone and continuing down the outside of the round or leg to the beginning of the gambrel cord. The grade marks shall also appear at two-inch intervals along the belly on each side of the carcass, across the shoulder and along the foreshank.

This amendment shall become effective December 1, 1944.

Issued this 1st day of December 1944.

FRED M. VINSON,
Economic Stabilization Director.

[1] 8 F. R. 10988.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 232

ROBERT B. BLALACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 112–123) is reported at 154 F. 2d 591.

JURISDICTION

The judgment of the circuit court of appeals was entered April 5, 1946 (R. 111), and a petition for rehearing was denied May 13, 1946 (R. 139). The time for filing a petition for a writ of certiorari was extended to and including June 27, 1946, by order of Mr. Justice Reed, entered June 3, 1946. The petition was filed June 25, 1946. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTIONS PRESENTED

1. Whether the Taft amendment to the Emergency Price Control Act of 1942 precluding the "Administrator" from requiring grade labeling of any commodity applied to a regulation promulgated by the Economic Stabilization Director under the Stabilization Act of 1942.

2. Whether the evidence is sufficient to support the verdict.

3. Whether the trial judge committed reversible error in refusing certain instructions requested by petitioner.

STATUTES AND REGULATIONS INVOLVED

The Taft amendment to the Emergency Price Control Act of 1942 (Act of July 16, 1943, c. 241, § 5 (a), 57 Stat. 566, amending the Emergency Price Control Act of January 30, 1942, c. 26, Title I, § 2, 56 Stat. 24) added to Section 2 of the Emergency Price Control Act a new subsection (50 U. S. C. App., Supp. IV, 902 (j)) providing, in pertinent part, that:

> Nothing in this Act shall be construed * * * (2) as authorizing the Administrator to require the grade labeling of any commodity.

Regulation No. 1[1] of the Office of Economic Stabilization provides, in pertinent part:

> Section 4002.1. No person shall * * * store or retain in his possession * * * any beef, veal, lamb or mutton unless such beef, veal, lamb or mutton has been graded and grade marked in the manner required by this regulation * * *.

Section 4002.2 thereof provides:

> No person shall * * * break * * * any * * * veal carcass or wholesale cut unless each such carcass and wholesale cut has been identified by grade in accordance with the provisions of this section. * * *
>
> Section 4002.2 (a) (2). Veal carcasses and the wholesale cuts therein contained shall be graded into the following uniform grades: Choice, good, commercial, utility and cull. In determining the grade of each such carcass the "Specifications for Official United States Standards for Grades of Veal and Calf Carcasses" set forth in § 1364.529 of Revised Maximum Price Regulation No. 169, and incorporated here-

[1] The Regulation (8 F. R. 10988), effective August 5, 1943, recites that it was promulgated "pursuant to the provisions of the Act of October 2, 1942, entitled 'An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes' (Public Law No. 729, 77th Congress, 2nd Session), Executive Order No. 9250, dated October 3, 1942, and Executive Order No. 9328, dated April 8, 1943."

The Regulation has been amended five times, but none of these amendments are relevant here.

in by reference, shall be used and the grade of such carcass shall apply to each wholesale cut derived therefrom, except that the specifications therein for the two grades, prime and choice, shall be combined and treated as a single grade, choice.

STATEMENT

Two informations were returned against petitioner in the United States District Court for the Western District of Tennessee on July 5, 1945, and July 23, 1945, respectively, charging that he violated provisions of the Stabilization Act of 1942 and of Regulation No. 1 of the Office of Economic Stabilization promulgated thereunder. The first information charged, in three counts, that petitioner had unlawfully (1) purchased and received ungraded meat, (2) broken a veal carcass, and (3) sold and offered to sell ungraded and unmarked meat (R. 2–4). The second information charged, in one count, that petitioner had unlawfully stored and retained in his possession meat not graded or grade marked as required by the applicable statute and regulation (R. 7).

Petitioner demurred to both informations on the ground, *inter alia,* that they did not state offenses against the laws of the United States (R. 10–12). The demurrer was overruled (R. 13), and thereafter the informations were consolidated for trial (R. 12, 13). After a trial by jury (R. 13), petitioner was found not guilty on counts 1

and 3 of the first information, and guilty on count 2 thereof and on the second information (R. 14). He was sentenced to imprisonment for eight months and to pay a fine of $500 on count 2 of the first information (R. 15–16), and to imprisonment for eight months and to pay a fine of $1,000 on the second information (R. 16), the terms of imprisonment to run concurrently (R. 16). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the conviction was affirmed (R. 111).

The evidence in support of the government's case [2] may be summarized as follows:

Beginning in 1941, petitioner operated under oral month to month lease two proximate, though not contiguous, retail meat markets in Memphis, at Nos. 200 and 210 North Cleveland Street (R. 38, 41). These properties were part of a large public market 2½ to 3 blocks square, known variously as the "City Markets" and the "Curb Markets" (R. 37). Petitioner's two shops contained "coolers" or "lockers," which were originally the only space available to him for storage and refrigeration (R. 38). In the spring of 1944, he leased additional cooler space (R. 38), described as "sizable" (R. 67), in another curb market building in back of and about 250 feet from the nearest of his two shops, and installed

[2] Petitioner offered no evidence but moved for a directed verdict at the close of the government's case (R. 80–84).

in it a 16 by 20 foot refrigerator (R. 38, 39, 42, 63).[3]

On June 9, 1945, a Department of Agriculture Meat Inspector, Dr. George E. Mitchell, accompanied by the Food Director of the Memphis Health Department, Samuel P. Penny, called at petitioner's place of business to investigate an alleged illicit interstate shipment of ungraded calves (R. 50–51, 64). Their visit was not directed to the violations here involved, nor did they in any way represent the Office of Economic Stabilization or the Office of Price Administration (R. 62, 63–64). They first inspected the lockers in the two retail markets and found that all the carcasses stored there were properly graded and stamped (R. 50–51, 65). Then, after some questioning, petitioner admitted to Mitchell and Penny that he maintained the other cooler in the back building (R. 52). He told them he used it only for hog carcasses and that nothing was in it at that time (R. 52, 66). The two officials then walked over to the separate cooler, but found it locked (R. 53, 66). Penny immediately returned to the retail shop and asked petitioner for the key (R. 66). Petitioner replied, "just a minute," walked off and was not seen again that day (R. 66). Petition-

[3] Petitioner had had a partner named Ledbetter, but on January 29, 1945, he acquired Ledbetter's entire interest by contract of sale and thereafter was sole proprietor and operator of the business conducted at all three locations (R. 38, 39, 41, 44).

er's former partner testified that at least until the dissolution of the partnership on January 29, 1945, the key to the cooler was hung from a post in one of the retail shops and was not accessible to outsiders except with permission (R. 46–47). The officials finally got the key from one Thomas, petitioner's employee (R. 53). They entered the cooler and found hanging there three large veal carcasses, weighing 225 pounds each, and, on a nearby table, a quantity of freshly cut up steaks and roasts, some of them in white porcelain pans and others in paper wrappings, besides a box full of bones and five hides (R. 53–55, 67). None of this meat bore any inspection or grade marking of any kind whatever, and the three carcasses were broken or "split" and then subdivided into quarters (R. 53, 54, 59, 68). On one paper wrapping the name "May" was written; on another paper, the notation "Cosby 1.25"; and on still another, "Mr. Mertz 4 TB Stks, 3 QrB Rst Rump" (R. 55, 79). The officials then sealed the cooler, returned to the retail market, and looked for petitioner but could not find him (R. 56, 57, 68). They left word with Thomas that they would return on Monday, June 11, at 9:00 a. m. and that petitioner should be on hand at that time (R. 58, 68).

When they returned the following Monday accompanied by the Supervising Investigator for the Food Enforcement Unit of the OPA, petitioner

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could not be located (R. 58, 59, 76, 77). After waiting for him for about two hours, the officials again went to the cooler, found the seal intact, entered it, and enabled the OPA Investigator to note the contents for himself (R. 58, 69, 76–77). Petitioner was not seen again prior to the trial except by Dr. Mitchell on Thursday or Friday of the following week (R. 58). When asked where he had been on Monday, June 11, he replied that he "* * * was looking for the man, for the fellow that put the meat in the cooler, looking all over the country," although he admitted at the same time that he had no idea who had put it there (R. 59). To the further query—"How did you know who to look for, if you didn't know who put it in," he replied merely that "he didn't know who put it in" (R. 59).

ARGUMENT

1. Petitioner urges that the Taft amendment to the Emergency Price Control Act of 1942 was a limitation on the Economic Stabilization Director as well as the Price Administrator and, therefore, made the issuance of O. E. S. Regulation No. 1 without legal basis (Pet. 22–26). However, this argument is negated by both the language and history of the amendment and the regulation.

The pertinent language of the Taft amendment is that "Nothing *in this Act* [i. e., the Emergency

Price Control Act] shall be construed * * * as authorizing *the Administrator* to require the grade labeling of any commodity. * * *"[4] The "Administrator" whose power is thus circumscribed can only refer to the Administrator of the Office of Price Administration and to no one else, since the Emergency Price Control Act also provides that (Section 201 (a), 50 U. S. C. App., Supp. V, 921 (a)):

> There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator").

There is nothing elsewhere in the Emergency Price Control Act or the Taft amendment to give any other meaning to the term "Administrator." Nor does Section 7 (b) of the Stabilization Act of 1942, under which Act the Regulation was promulgated, require any other conclusion. That section made certain provisions of the Emergency Price Control Act applicable to regulations "issued by the Price Administrator in the exercise of any functions which may be delegated to him under authority of"[5] the Stabilization Act. However, the Regulation was not "issued by the Price Administrator," but by the Economic Stabiliza-

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[4] Emphasis supplied.

[5] Sec. 7 (b), Act of October 2, 1942, c. 578, 56 Stat. 767, 50 U. S. C. App., Supp. V, 967 (b).

tion Director.[6] In fact, the directive of the Economic Stabilization Director authorizing the Price Administrator to enforce the Regulation confirms this; it expressly stated that the power to enforce was not to include the power to change, amend, revoke, or rescind its provisions or to issue regulations requiring grade labeling of any commodity.[7]

That the Taft amendment was a limitation on the power of the Price Administrator alone and does not affect the validity of Regulation No. 1 is corroborated by Senator Taft's remarks on the floor of the Senate[8] and the fact that Congress,

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[6] For the same reason, i. e., that the Economic Stabilizer promulgated the Regulation under authority of the Stabilization Act of 1942, there is no foundation for petitioner's suggestion (Pet. 25–26) that Section 2 (h) of the Emergency Price Control Act (50 U. S. C. App., Supp. V, 902 (h)) is violated by O. E. S. Regulation No. 1. The latter section of the Emergency Price Control Act in terms applies only to the exercise of powers under that Act by the Price Administrator.

[7] Directive No. 184, of September 14, 1943 (8 F. R. 12669).

[8] At 89 Cong. Rec. 7252:

"Mr. GEORGE. Mr. President, I was about to ask how the language in the joint resolution would affect whatever power there would be, but I see the suggestion is offered by way of amendment to the Emergency Price Control Act itself.

"Mr. TAFT. Yes. All the powers of the Price Administrator are derived from that act, so it affects only his powers."

The "resolution" referred to was H. J. Res. 147, to continue the Commodity Credit Corporation. It was as a "rider" to this measure that Senator Taft offered his amendment to the Emergency Price Control Act prohibiting grade labeling by the Price Administrator. Its adoption by the Senate followed immediately after the quoted colloquy (89 Cong. Rec. 7250–7252).

being aware of the administrative construction,[9] twice reenacted both the Emergency Price Control Act and the Stabilization Act [10] without changing the provisions of the Taft amendment. Under familiar principles, the administrative interpretation that the Economic Stabilization Director was empowered [11] to promulgate the Regulation and was not limited by the Taft amendment, must be deemed to have been ratified. See, e. g., *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Koshland* v. *Helvering*, 298 U. S. 441, 445; *Taft* v. *Commissioner of Internal Revenue*, 304 U. S. 351, 357.

2. Petitioner's second point is that the conviction must be reversed because it was based wholly on circumstantial evidence which did not exclude

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[9] Congress must be deemed to have known of the administrative construction by reason of the publication of the Regulation in the Federal Register (8 F. R. 10988). Moreover, on October 27, 1943, a subcommittee on Brand Names of the House Committee on Interstate and Foreign Commerce had reported that O. E. S. Regulation No. 1 "* * * was designed to allay widespread fears that following the Taft amendment grading and labeling of meat would have to be discontinued * * *" and that "No opposition against this system of grading and labeling of meat was voiced at any time in testimony before the subcommittee." H. Rep. No. 808, 78th Cong., 1st sess., p. 36.

[10] 58 Stat. 632; 59 Stat. 306.

[11] The authority for this exercise of power derived from Sections 1 and 2 of the Stabilization Act of 1942 was fully set forth in the Stabilization Director's Statement of Reasons accompanying the Regulation. See I O. P. A. *Food Desk Book*, pp. 1031–1032.

every reasonable hypothesis but that of guilt, and because, even if on appeal a conviction based on circumstantial evidence is to be tested by the substantial evidence rule, the evidence does not support the conviction (Pet. 27–43).

We are constrained to disagree with petitioner on both phases of this argument. As shown in the Statement and as recited by the court below (R. 116–117):

> It was established that appellant was the owner of the meat business and controlled two retail meat shops and leased the cooler where the unlabeled meat was found. The cooler was about 75 feet from one market and 250 feet from the other. There is a substantial inference that appellant deliberately absented himself on Monday morning, necessitating a wait at the cooler by the agents for a matter of two hours and finally, entry by way of a window. There were at least three skinned carcasses in the cooler which had been in the process of being cut into roasts, etc. One piece of meat was even wrapped up and had a name and address on it. There was ample evidence of substantial activity with unlabeled meats on the part of some one. Appellant's employees had access to the cooler and there was no evidence that any one else ever had unsupervised access thereto. There is a strong inference that appellant's employees, then, were working the meat. It is most

> unlikely that any one of those employees could have used the cooler and have done that volume of butchering without the fact coming to appellant's ears. It is more likely that they were working at appellant's direction. These facts and inferences, coupled with appellant's suspicious conduct at the time Dr. Mitchell and Mr. Penny asked him about the cooler, his absence immediately thereafter, and his inconveniencing absence on Monday morning, when he was asked to be present, supply, we think, competent and substantial evidence to support a conclusion that he had knowledge of what was happening.

Petitioner's attack upon the circumstantial strength of the facts thus recited (Pet. 28–32) is without warrant. Contrary to petitioner's suggestion that his possession of the meat was merely constructive and therefore not enough to establish an inference of guilt, the facts show that his possession was more actual than constructive. The cooler in which the meat was located was in a building nearby the retail premises actively operated by petitioner, and the key to the meat cooler was kept on the latter premises and used only by or with the permission of petitioner or his employees. This possession was far different from the technical constructive possession flowing from ownership alone which was involved in the *Russo* case, 123 F. 2d 420 (C. C. A. 3), and others

cited by petitioner (Pet. 28–29). Petitioner further attempts to show that his absence from his place of business while agents were inspecting the premises cannot raise an inference of guilt, because it was normal and explainable. But the evidence is to the contrary, particularly the testimony that he was evasive in disclosing that he had the cooler in question, that he disappeared when on June 9 Dr. Mitchell and Mr. Penny asked him for the keys to the cooler, and that he did not respond to their request, left with his employee Thomas, to be there at nine o'clock the following Monday morning. Moreover, no weight can be given petitioner's argument that the evidence of quantities of ungraded meat in the cooler cannot lay the basis for an inference that he, or his employees acting for him, was responsible because others had access to the cooler and could have put the meat there. Even assuming the remote possibility that someone else brought the meat through the cooler window by day or night or somehow surreptitiously gained use of the key from petitioner's retail store and thereby obtained access to the cooler and used it to store and cut the quantities of meat later found there, it is highly improbable that all of this could have been accomplished without the fact coming to petitioner's attention. By the same token, it is highly improbable that his employees were the guilty parties, unknown to him, where he main-

tained active control and operation of the adjoining retail premises.

It is apparent, therefore, that all of the circumstances pointed positively and not conjecturally[12] to petitioner's guilt, so that the trial judge properly denied his motion for a directed verdict. But petitioner urges that the court below applied an erroneous test in determining the propriety of the trial judge's ruling; that it applied the substantial evidence rule rather than the rule, applicable to cases predicated on circumstantial evidence, that the evidence must exclude every reasonable hypothesis except that of guilt. Several circuits in reviewing rulings on a motion for directed verdict have stated the requirement as petitioner contends. See, e. g., *Leslie* v. *United States,* 43 F. 2d 288, 289–290 (C. C. A. 10). But these opinions are not in accord with decisions of this Court or with the historically proper treatment of the function and scope of a motion for directed verdict. Thus, in *Glasser* v. *United States,* 315 U. S. 60, this Court said (at p. 80):

> It is not for us to weigh the evidence or to determine the credibility of witnesses.

[12] Petitioner partially relies upon an alleged rule that an inference cannot be built upon an inference in attempting to demonstrate that the ultimate evidentiary conclusions were insupportable (Pet. 29, 31). But, as Wigmore correctly demonstrates, "There is no such orthodox rule; nor can be. If there were, hardly a single trial could be adequately prosecuted." Wigmore, *Evidence* (3d ed.), § 41, p. 435.

> The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *United States* v. *Manton*, 107 F. 2d 834, 839, and cases cited. Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and a collocation of circumstances." *United States* v. *Manton, supra.* We are clear that, from the circumstances outlined above, the jury could infer the existence of a conspiracy and the participation of Roth in it.

Even assuming, *arguendo,* that the evidence must be viewed as if by the jury, it is sufficient to support the verdict. That test is, as stated by petitioner, that where guilt depends on circumstantial evidence, the evidence *in toto* must be inconsistent with any reasonable hypothesis of innocence. But the rule does not require the exclusion of *every* hypothesis or possibility of innocence, but only of any *fair* and *reasonable* hypothesis except that of guilt.[13] Nothing in the rule prevents the jury's finding guilt entirely upon circumstantial evidence; and the requirement of

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[13] "Circumstantial evidence need not be such that no possible theory other than guilt can stand, but the theory of guilt must be beyond a reasonable doubt, i. e., the circumstances must not be consistent with innocence within a reasonable doubt." 2 Wharton's *Criminal Evidence* (11th ed.) § 922, p. 1608.

proof beyond a reasonable doubt operates on the whole case and not upon separate bits of evidence. Tested by these principles, the evidence here amply justified the verdict as shown above. The circumstances were such that it was, at best, only a remote possibility that someone else unknown to petitioner could have been the party who put the meat in the cooler. That, coupled with petitioner's obvious evasion of the Government's agents, excluded every reasonable hypothesis but that of guilt.

3. Petitioner's third and last point is that it was prejudicial error for the trial judge to refuse certain requested instructions. The first was that the jury was precluded from speculating as to which of two or more individuals might have committed the offense; the second was that finding unstamped meat on property previously rented to petitioner was insufficient to overcome the presumption of innocence (Pet. 44–46). The impropriety of such instructions has, in effect, already been answered by our argument in point 2 above. The trial judge correctly refused the first instruction because, from the evidence, the jury would not be speculating as to whether petitioner or someone else was responsible for the ungraded meat being in the cooler, the evidence excluding every reasonable hypothesis but that petitioner himself was responsible. It would

have been error, therefore, for the court to have instructed the jury, as requested, and thereby create an assumption, entirely unwarranted from the evidence, that it was speculative whether petitioner or someone else was the responsible party. Cf. *United States* v. *Turley,* 135 F. 2d 867 (C. C. A. 2), certiorari denied *sub nom. Burns* v. *United States,* 320 U. S. 745; *Grace* v. *United States,* 4 F. 2d 658 (C. C. A. 5), certiorari denied, 268 U. S. 702. For similar reasons, the second instruction was properly refused. It was predicated on one isolated bit of evidence, the fact that petitioner had previously rented the cooler, and misleadingly treated this bit of evidence as if it were the only evidence for the jury's consideration to weigh against the presumption of innocence. Cf. *Showalter* v. *United States,* 260 Fed. 719 (C. C. A. 4), certiorari denied, 250 U. S. 672; *Mannix* v. *United States,* 140 F. 2d 250 (C. C. A. 4); *United States* v. *Dewinsky,* 41 F. Supp. 149 (D. N. J.). However, as has been shown above, there was an abundance of evidence, of which this was only one small part, which the jury properly could and must have taken into consideration in determining petitioner's guilt.

CONCLUSION

The decision below is correct, and there is involved no question of importance or material

conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
DAVID LONDON,
Director, Litigation Division,
SAMUEL MERMIN,
ARTHUR G. SILVERMAN,
Attorneys,
Office of Price Administration.

JULY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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Cases Cited.

Textbooks Cited.

Statutes Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

ROBERT B. BLALACK, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	}	No. 232.

PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes the petitioner, Robert B. Blalack, and presents this, his petition for rehearing in the above-styled cause, upon the grounds hereinafter specifically stated:

PRELIMINARY STATEMENT.

On October 14, 1946, this Court entered the following order in the cause:

The petition for writ of certiorari in this case is

denied. The Chief Justice took no part in the consideration or decision of this application.

In reaching its conclusion, this Court apparently overlooked two questions of general importance fairly raised by the petition for certiorari which have not been, but should be, determined by this Court and they will again be directed to its attention.

I.

The trial Judge, in overruling the motion for a directed verdict, and the Circuit Court of Appeals in sustaining his ruling, applied an erroneous test in determining the sufficiency of the circumstantial evidence to justify the submission of a case to the jury.

At page 15 of their brief, opposing the petition for certiorari, attorneys for the Government concede that there is a conflict in the circuits on the proposition above stated, saying:

"* * * But petitioner urges that the court below applied an erroneous test in determining the propriety of the trial judge's ruling; that it applied the substantial evidence rule rather than the rule, applicable to cases predicated on circumstantial evidence, that the evidence must exclude every reasonable hypothesis except that of guilt. Several circuits in reviewing rulings on a motion for directed verdict have stated the requirement as petitioner contends. See, e. g., **Leslie v. United States**, 43 F. 2d 288, 289-290 (C. C. A. 10). But these opinions are not in accord with decisions of this Court or with the historically proper treatment of the function and scope of a motion for directed verdict. Thus, in **Glasser v. United States**, 315 U. S. 60, this Court said (at p. 80):

"'It is not for us to weigh the evidence or to

> determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. **United States v. Manton**, 107 F. 2d 834, 839, and cases cited. Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and a collocation of circumstances." **United States v. Manton**, supra. We are clear that, from the circumstances outlined above, the jury could infer the existence of a conspiracy and the participation of Roth in it.' "

As conceived by petitioner, the probative sufficiency of circumstances, not merely the weight they should be given, which is a question for the jury, is involved where the circumstances are as consistent with innocence as with guilt. Or, otherwise expressed, circumstances that may be reconciled with a reasonable theory of innocence do not constitute substantial evidence of guilt, and this is a question of law for the court.

Directly in point is the well-considered case of Isbell v. United States, 8th Circuit, 227 Fed. 788, 790, 793, from which we quote as follows:

> "If there is, at the conclusion of a trial, no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, for facts consistent with his innocence are never evidence of his guilt. Nor does the duty of the court to consider and determine whether or not there is substantial evidence of facts which exclude every other hypothesis but that of guilt require the court, in our opinion, to pass upon the weight of the evidence, the credibility of the witnesses, or to direct an acquittal unless he believes the defendant guilty beyond a reasonable doubt."

The rule, as thus stated in **Isbell v. United States**, supra, is sustained by the great weight of authority.[1]

The Circuit Court of Appeals for the Second Circuit has repudiated the rule established by the great weight of authority, including State decisions (see p. 34 of our brief in support of the petition for certiorari), and holds that the jury may make choice between an inference of guilt and an inference of innocence where either may reasonably be drawn from the same circumstances. **United States v. Picarelli**, 2nd Circuit, 148 F. 2d 997, 998. But this holding disregards the fundamental principle stated in **Isbell v. United States**, supra, that facts or circumstances consistent with innocence of the accused "are never evidence of his guilt."

The Glasser case, supra, though cited by the Government in its brief as being in conflict with the holding in **Leslie v. United States**, supra, and other cases in accord with the majority rule, does not reach the point under discussion and, in so claiming, the Government attorneys failed to make the proper distinction between a question involving the weight of the evidence, including the credibility of witnesses, with a question of its probative sufficiency. If the circumstances are as consistent with innocence as with guilt, they do not constitute substantial evidence of guilt and it is for the court, not the jury, to determine whether there is substantial evidence which fairly tends to support a verdict of guilty.

Apprehending that this Court may have been misled by the assertion at page 15 of the Government's brief that

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1 Yoffe v. U. S., 1st Cir., 153 F. 2d (Ad. Shts.) 570, 572, 573;
U. S. v. Russo, 3rd Cir., 123 F. 2d 420, 422;
Garst v. U. S., 4th Cir., 180 Fed. 339;
Kassin v. U. S., 5th Cir., 87 F. 2d 183-185;
Karchmar v. U. S., 7th Cir., 61 F. 2d 623;
Isbell v. U. S., 8th Cir., 227 Fed. 788, 790, 792, 793;
Fosse v. U. S., 9th Cir., 44 F. 2d 915, 918;
Leslie v. U. S., 10th Cir., 43 F. 2d 288, 289;
Sleight v. U. S., D. C. App., 82 F. 2d 459, 461;
Wharton on Criminal Evidence, 11th Ed., Vol. 2, Secs. 883, 922;
Jones on Evidence, 2nd Ed., Vol. 1, Sec. 12, p. 23.

the Glasser case, supra, is in conflict with the rule pronounced in Leslie v. United States, supra, and cases in accord, we have again brought the matter to its attention.

It is difficult to conceive a question of more importance in circumstantial evidence cases than the question of whether the rule that the evidence must exclude every rational hypothesis except guilt is a mere admonition to the jury or a rule that should be applied by the courts in determining the probative sufficiency of the evidence to support a verdict. Yet, that point, on which there is conflict between the decisions of the Second Circuit and those of a majority of the circuits, has not been adjudicated by this Court.

II.

According to both the prevailing opinion and the dissenting opinion of this court in Thomas Paper Stock Company et al. v. Porter, Admr. (66 S. Ct., Adv. Sheets 884, 888), the Taft Amendment had its origin in the Congressional view that the Price Administrator in regulations theretofore promulgated had "exceeded the limitations expressed in section 2 (h)" of the 1942 Price Control Act.

In the majority opinion, Mr. Justice Frankfurter says:

> "The legislation (Taft Amendment) was too specifically directed against prior unauthorized regulations, promulgated no doubt with the best of motives in the great effort against inflation, for us to give it a meaning other than that which the language in the context of its history yields."

Mr. Justice Black in the dissenting opinion, concurred in by Mr. Justice Douglas and Mr. Justice Murphy, says:

> "What then was the purpose of Congress in enact-

ing the Taft Amendment? The Managers on the part of the House thus stated the Section's purpose in the Conference Report on the Amendment: It 'is to meet the objection that the Price Administrator has exceeded **the limitations expressed** in section 2 (h) of * * * (the 1942 Price Control Act) * * * in issuing certain regulations already promulgated.' (Emphasis supplied.) Section 2 (h) provides: 'The powers granted * * * shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, **except to prevent circumvention or evasion of any regulation, order, price schedule, or requirements under this Act.**' (Emphasis supplied.) As the Conference Report indicates, the Taft Amendment actually added little new, if anything at all, to the requirements already contained in Section 2 (h)."

It is clear of doubt that according to the Congressional view, any regulation requiring the grade labeling of commodities was not only unauthorized by the Price Control Act of 1942, but exceeded the limitations of Section 2 (h) of that Act, and this court substantially so held in the Thomas Paper Stock Company case. The Taft Amendment, designed to emphasize the Congressional intent and to strike down any such regulation theretofore promulgated, was specifically directed against acts of the Price Administrator because he was the official who had issued the offending regulations. But the operation of Section 2 of the Price Control Act was not restricted to the Price Administrator and the limitations of that section remained in full force and effect after the Price Control Act had been amended by the Stabilization Act of 1942, and could not be suspended in whole or in part even by the President (U. S. C., Title 50, Appendix, Sec. 962).

So we have a situation where, according to the Congressional view as interpreted by this court (Thomas Paper

Stock Company et al. v. Porter, Admr.), any regulation, requiring the grade labeling of commodities, exceeded the limitations of Section 2 (h) of the Price Control Act, limitations not modified by the Stabilization Act, and where such a regulation, theretofore promulgated by the Price Administrator, was invalidated by the Taft Amendment.

Prior to the adoption of the Taft Amendment, the Price Administrator had issued a regulation requiring that beef and veal carcasses be graded and grade labeled (Revised Maximum Price Regulation No. 169).

OES Regulation No. I, issued August 5, 1943, this being twenty days subsequent to the adoption of the Taft Amendment, incorporated by reference the grade requirements of Revised Maximum Price Regulation No. 169, and delegated to the Price Administrator the duty of enforcing that regulation as it provided for the grading and grade labeling of meats (Directive 184, 8 F. R. 12669).

In Issuing OES Regulation No. I and Directive 184, the Economic Stabilization Director restored the identical situation which Congress intended to prevent by Section 2 (h) of the Price Control Act, and to correct by the Taft Amendment. It is entirely immaterial that the Economic Stabilization Director acted from the best motives and had no purpose of evading, circumventing or nullifying an act of Congress or disregarding the legislative intent, but the fact remains that OES Regulation No. I for all practical purposes continued in full force and effect, a regulation which, according to the view of Congress, exceeded the limitations of Section 2 (h) of the Price Control Act and which, according to the opinion of this Court, was actually invalidated by the Taft Amendment.

A regulation having this effect should not be sanctioned by the Courts. At any rate, the conviction of petitioner under a regulation that Congress apparently intended to exclude from the area in which regulations might be

adopted, would seem to present a question of such importance as to justify its consideration and determination by this Court.

Wherefore, petitioner prays that the court reconsider the several grounds urged in the petition for certiorari but particularly the points presented in this petition, and that upon such reconsideration the Writ of Certiorari be granted as prayed for in the petition and the case set for hearing on the merits.

Respectfully submitted,

WALTER P. ARMSTRONG,
R. G. DRAPER,
D. L. GERWIN,
L. E. GWINN,
Attorneys for Petitioner.